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In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT P. DAVIS
EVAN M. TAGER
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

STEPHEN M. SHAPIRO
Counsel of Record
JAMES D. HOLZHAUER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

JON P. KARDASSAKIS
Hawkins, Schnabel, Lindahl & Beck LLP
600 South Figueroa Street
Suite 1500
Los Angeles, California 90017
(213) 488-3900

Counsel for Petitioner

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QUESTION PRESENTED

Respondent, who has chronic hepatitis C, a debilitating liver condition, applied for a job at Chevron's refinery that would have exposed him to a range of liver-toxic chemicals. After Chevron's doctors and respondent's own physician agreed that daily exposure to these chemicals would accelerate the deterioration of respondent's liver and that a large-scale exposure from a burst pipe, fire, or other emergency could quickly kill him, Chevron declined to hire him. In conflict with decisions of other courts of appeals as well as with EEOC regulations and guidelines squarely on point, the Ninth Circuit, in an opinion by Judge Reinhardt, held that under the Americans with Disabilities Act, an employer may not refuse to hire an employee whose medical condition would make the particular position he seeks dangerous to his health or life. Judge Trott dissented.

The question presented is:

Whether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person's own health or life is a "qualified individual" who satisfies "qualification standards" for that job within the meaning of the Americans with Disabilities Act.

RULES 14.1 AND 29.6 STATEMENT

The parent of petitioner Chevron U.S.A., Inc., is Chevron Corporation. No other publicly held company owns 10 percent or more of petitioner's stock.

Irwin Industries, Inc., was a defendant in the district court but was not a party to the proceeding in the court of appeals and is not a petitioner here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chevron U.S.A., Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 226 F.3d 1063 (superseding the opinion reported at 213 F.3d 1098). The court of appeals' opinion addressing respondent's state law intentional interference with contract claim (App, *infra*, 25a-29a) is unreported. The opinion of the district court (App., *infra*, 32a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. Petitioner filed a timely petition for rehearing and rehearing en banc on June 9, 2000. The court of appeals issued an amended opinion on September 26, 2000. It denied Chevron's rehearing petition on December 12, 2000. App., *infra*, 30a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12111, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, together with relevant portions of the regulations implementing those statutes, are reproduced at App., *infra*, 58a-61a.

STATEMENT

Chevron withdrew an offer to employ respondent in a refinery job in which he inevitably would have been exposed to liver-toxic substances after Chevron's physicians determined that respondent had a "history of a long term liver problem, [a] diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes." C.A. App. 81. Chevron's physicians concluded that the "exposure to hepatotoxic chemicals"

involved in the job "would further damage [respondent's] already reduced liver capacity," "seriously endanger his health," and "potentially cause [his] death." *Id.* at 81-82. Respondent's own doctor advised Chevron that respondent should not be exposed to hepatotoxins. App., *infra*, 37a, 47a.

The Ninth Circuit majority (Reinhardt and Bright, JJ.) nevertheless held that respondent was "qualified" for the refinery job within the meaning of the Americans with Disabilities Act ("ADA") because he posed no "direct threat" to other people. Chevron could not refuse to hire respondent on the ground that doing the job "most probably will endanger his life." App., *infra*, 21a.

That "bizarre" result, as Judge Trott described it (App., *infra*, 21a), creates numerous conflicts with other courts of appeals. The Ninth Circuit's ruling conflicts with the holding of the Seventh Circuit that an employee is not a "qualified individual" under the ADA if there is "no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from." *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 601, 603 (7th Cir. 1999). It conflicts with decisions that recognize a "direct threat" defense to ADA liability where an employee's "assigned tasks presented grave risks to [the] employee" as a result of a medical condition. *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996); see also *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1288-1294 (10th Cir. 2000). It conflicts with decisions that safety requirements may be included in the "qualification standards" for a position. *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873-874 (5th Cir. 2000); *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 143 (1st Cir. 1997). And it is at odds with cases interpreting virtually identical language in the Rehabilitation Act, which hold that persons who "pose a significant risk of harm to themselves" are not "qualified." *Doe* v. *New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981); see also *Daugherty* v. *City of El*

Paso, 56 F.3d 695, 697-698 (5th Cir. 1995); *Knapp* v. *Northwestern Univ.*, 101 F.3d 473, 482-484 (7th Cir. 1996).

Beyond creating sharp conflicts among the circuits, the court of appeals' decision expressly overrides regulations of the Equal Employment Opportunity Commission, the expert agency Congress charged with implementing the ADA's employment provisions. App., *infra*, 11a-12a. Those regulations provide that an employer may establish as a "qualification standard" "medical" and "safety" requirements that an applicant must meet, and that such standards may exclude an applicant who would pose a "significant risk of substantial harm to the health or safety of the individual or others." 29 C.F.R. §§ 1630.2(q), (r), 1630.15(b)(2). The court of appeals' ruling also is inconsistent with the command of the Occupational Safety and Health Act (as well as state worker protection laws) that employers provide a safe workplace for all employees. 29 U.S.C. § 654.

The "absurd" result in this case—one that will cost workers' lives and force unwilling employers to be complicit in their injuries—is not what Congress had in mind when it enacted the ADA, as the plain language and legislative history demonstrate. App., *infra*, 23a. Absent this Court's intervention, businesses will face intolerable uncertainty in determining how to comply with the requirements of the ADA in the face of conflicting judicial and regulatory commands, while also complying with OSHA and state worker protection laws. These factors have led commentators to describe the Ninth Circuit's ruling as "one of the most important decisions under the ADA during the 10 years since it has been in effect," and to observe that it "cries out for Supreme Court review." Hudson, *Paternalism is Out*, ABA Journal, Feb. 2001, at 30.

The full articulation of competing views in the opinions below makes this the ideal case in which to resolve the important question presented. This case also presents the Court

with an opportunity to address the issue left unresolved in *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 & n.15 (1999)—whether all safety-related qualification standards "must satisfy the ADA's 'direct threat' criterion" to be valid.

A. The Statutory And Regulatory Scheme

The Americans with Disabilities Act of 1990 prohibits an employer from discriminating in employment decisions "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is someone with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential," and that an employer's "written description" of the job is evidence of its essential functions. *Ibid.*

It is "a defense to a charge of discrimination" under the ADA that an individual was denied employment as the result of the employer's "application of qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). The statute provides one example of a qualification standard: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

The responsibility of an employer who denies employment to an applicant because the job would endanger his health or life may be analyzed in terms of whether the applicant is a "qualified individual" pursuant to ADA sections 12111(8) and 12112(a), or in terms of whether the absence of such danger is a proper "qualification standard" and therefore a defense to

ADA liability under section 12113(a). The EEOC's regulation expressly recognizes a defense where there is "a significant risk of substantial harm to the health or safety *of the individual* or others," and describes the basis on which it may be determined that such a threat exists. 29 C.F.R. § 1630.2(r) (emphasis added).

B. Chevron's Determination That Respondent Was Not Qualified For The Plant Helper Job

Respondent Mario Echazabal worked at Chevron's oil refinery in El Segundo, California from 1972 until 1996, employed by independent maintenance contractors, most recently by Irwin Industries, Inc. ("Irwin"). In 1992, Echazabal applied to work directly for Chevron in the refinery's coker unit. Chevron offered him the job, contingent on a satisfactory medical examination. Chevron's regional physician, Dr. Baily, conducted that examination and concluded from the results of tests showing elevated levels of liver enzymes in Echazabal's blood that he had "an uncorrectable liver abnormality, and should avoid exposure to solvents and other liver toxic chemicals in order not to exacerbate his liver problems." Dr. Baily's successor, Dr. McGill, agreed with this conclusion. On that basis, Chevron rescinded its offer of employment to Echazabal, who continued to work at the refinery for Irwin. Thereafter, Echazabal's own doctors diagnosed him with chronic active hepatitis C and treated him with the drug Interferon. App., *infra*, 34a, 36a; C.A. App. 86.

In late 1995 Echazabal again applied to Chevron for a position as plant helper in the refinery's coker unit. Chevron's official "job summary" (C.A. App. 156-159) included a description of the "physical/environmental demands" of the plant helper job and of worker abilities necessary to withstand those demands. *Id.* at 159. That description identified as "airborne contaminants and chemicals in work environment" "hydrocarbon liquids and vapors, acid, caustic, refinery waste

water and sludge, petroleum solvents, oils, greases, [and] chlorine bleach." *Ibid.*; App., *infra*, 36a-37a.

Chevron offered Echazabal the plant helper job contingent upon his passing a medical examination. In conducting that examination, Chevron's Dr. McGill—who has practiced industrial medicine since 1980—reviewed results of eight blood tests taken between 1992 and 1996. All of those tests showed that Echazabal had significantly elevated levels of liver enzymes, which had not improved despite treatment with Interferon. App., *infra*, 35a-36a. Dr. McGill also reviewed the written job summary of the plant helper position identifying environmental conditions to which a plant helper is exposed, including "several that are hepatotoxic." C.A. App. 80-81; App., *infra*, 36a-37a. He concluded that Echazabal "faced a significant risk of substantial harm" in the plant helper position and "could not safely perform that job." C.A. App. 85.

Given Echazabal's "long term liver problem, his diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes over a period of years" evidencing "a reduced liver function" and "progressive liver disease," Dr. McGill concluded that "further exposure to hepatotoxic chemicals and solvents would * * * seriously endanger [Echazabal's] health" and "could be fatal." "Small exposures over a long period of time" would compromise his health. "[A] single event large exposure (for example, as a result of a ruptured pipe, a relief valve popping and venting, a fire, explosion or other emergency situation)" could "potentially cause death." C.A. App. 81-82. Dr. McGill was also informed by Echazabal's own physician, orally and in writing, that Echazabal should not be exposed to hepatotoxic substances. App., *infra*, 37a; C.A. App. 195.

Chevron's medical director, Dr. Bridge, agreed with Dr. McGill's assessment that Echazabal could not safely work in the plant helper position. Dr. McGill then informed Chevron's personnel director that if Echazabal were hired, it should be

subject to a work limitation: "No exposure to solvents or other liver toxic chemicals." The personnel director determined that such exposure is "a necessary and inseparable part of the plant helper position," and accordingly withdrew Echazabal's conditional job offer. App., *infra*, 38a-39a.

Shortly thereafter, Chevron sent a letter to Irwin explaining Echazabal's medical condition and asking Irwin to "remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." App., *infra*, 39a. Irwin removed Echazabal from Chevron's refinery and had him examined by a physician. Dr. Tang, who is board certified in occupational medicine and teaches that subject, reviewed Echazabal's test results for Irwin and "concluded that exposure to liver toxins would harm and probably kill" him. *Id.* at 40a. After such exposures, "some people have died of massive hepatic failure in a few hours, and [it] can also occur over months and years." C.A. Supp. App. 23. Dr. Tang stated that Echazabal "has a condition that will be worsened by [exposure to hepatotoxins], causing probable death. * * * If he's exposed to hepatotoxins, he should not be there." *Id.* at 27. Echazabal was laid off by Irwin, though there are factual disputes concerning the course of events involving Irwin and Echazabal. App., *infra*, 41a-42a.[1]

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[1] Echazabal produced testimony from two doctors retained for purposes of this litigation who dispute whether his elevated enzyme levels reflect liver damage or reduced liver function and also dispute the determination of Chevron's doctors that exposure to substances at the refinery would endanger Echazabal's life and health. See App., *infra*, 36a, 48a. The district court correctly held that the legally relevant inquiry for the purpose of Echazabal's claims is whether Chevron reached a "reasonable medical judgment" based on "the best available objective evidence" at the time the employment decision was made. *Id.* at 48a-49a. See 29 C.F.R. § 1630.2(r) (establishing that test); *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 602 (7th Cir. 1999) (determination "must be made 'as of the time of the

C. Respondent's Suit And The District Court's Grant Of Summary Judgment To Chevron

Echazabal filed suit against Chevron in April 1997 alleging that Chevron's withdrawal of his employment offer violated the Americans with Disabilities Act, the Rehabilitation Act, and California's Fair Employment and Housing Act, Cal. Gov't Code § 12940 ("FEHA"), and that Chevron intentionally interfered with Echazabal's contractual relations with Irwin. Echazabal sought punitive as well as actual damages for each claim.[2] The district court (Baird, J.) granted summary judgment to Chevron on each of those counts.

The district court carefully reviewed the relevant statutes, regulations, and case law, concluding that under the ADA, Rehabilitation Act, and FEHA, "an employer may lawfully refuse to hire a disabled individual who is not otherwise qualified because the proposed employment poses a direct threat to the health of the employee himself." App., *infra*, 46a. The court engaged in a detailed review of the medical evidence and evidence concerning environmental conditions in Chevron's refinery. The court found it "undisputed" that Chevron's determination that Echazabal posed a direct threat to

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employment decision'"). The court held that the evaluations of Echazabal's expert witnesses, "even if correct, were not available to Chevron" when it withdrew its offer, and that "the evidence which was available to [Chevron] supported [its] decisions." App., *infra*, at 49a. The difference of opinion between Echazabal's and Chevron's physicians, on the one hand, and Echazabal's expert witnesses on the other, was not mentioned in the Ninth Circuit majority's opinion. It has no bearing on the legal issues decided by the court of appeals and presented in this petition.

[2] Respondent also alleged that Irwin violated the ADA, Rehabilitation Act, and FEHA. The district court denied Irwin's summary judgment motion and the claims against Irwin are not at issue here.

his own health and safety was based on an individualized assessment by Dr. McGill supported by consultation with other Chevron doctors and Echazabal's own physician. *Id.* at 47a. The court also found that "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed, as posing a serious, immediate risk to him." *Ibid.*

Because Chevron had made a reasonable medical judgment based on available evidence that the plant helper job would endanger Echazabal's health and life, the court granted Chevron summary judgment on Echazabal's ADA, Rehabilitation Act, and FEHA claims. App., *infra*, 52a. The court also granted Chevron summary judgment on Echazabal's intentional interference with contractual relations claim, because he had presented no evidence that Chevron intended that his relation with Irwin be terminated. *Id.* at 53a. The district court certified its grant of summary judgment to Chevron for immediate appeal under Fed. R. Civ. P. 54(b). C.A. App. 646-652.

D. The Ninth Circuit's Divided Decision

In his appeal, Echazabal argued that whether Chevron had adequately established that Echazabal would pose a direct threat to his own safety could not properly be resolved on summary judgment. Echazabal did not initially challenge the district court's ruling that the "direct threat" defense applies when the threat is to an applicant's or employee's own health. Instead, the issue was raised by the panel, *sua sponte*, in a request for supplemental briefing. App., *infra*, 5a n.3.[3]

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[3] The EEOC declined the court of appeals' invitation to file a brief on the question whether the "direct threat" defense applies to threats to self. App., *infra*, 11a n.7. The Chamber of Commerce of the United

The Ninth Circuit reversed the district court's grant of summary judgment on the ADA claim. The majority concluded that the ADA's "direct threat" defense does not apply to applicants or employees who pose a direct threat to their own health or safety but not to the health or safety of others in the workplace. App., *infra*, 13a. The majority also rejected Chevron's argument that Echazabal was not "qualified" to perform "essential functions" of the plant helper job because of the risks the job posed to him, holding as a matter of law that "not posing a risk to one's own health or safety cannot in itself constitute an essential job function." *Id.* at 17a. The majority reasoned that in specifying a "direct threat to others" defense in section 12113(b), Congress intended "to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work," and also intended to preclude "a personal safety requirement [as] a valid qualification standard." *Id.* at 16a & n.10. The majority acknowledged that these rulings are in conflict with the decisions of other courts of appeals. *Id.* at 6a, 17a n.11. Furthermore, in reaching its decision the majority expressly "reject[ed] the EEOC's contrary interpretation" of the ADA, even though it recognized that "Congress explicitly required the EEOC to issue regulations implementing Title I" of the ADA (which includes the employment provisions at issue here). *Id.* at 11a-12a & n.8.

Judge Trott dissented. He stated that the majority's "Pickwickian ruling" is "bizarre" and "leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with

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States and Equal Employment Advisory Council filed a supplemental amicus brief in support of Chevron explaining that the "direct threat" defense is not the only way of showing that an individual is not "qualified" for the job, and that an individual who cannot perform the job without incurring serious injury is not a "qualified individual."

narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper." App., *infra*, 21a, 23a. He observed that the majority's decision also has the "pernicious" effect of "dislodg[ing] longstanding laws mandating workplace safety. * * * So much for OSHA" and state safe-workplace laws. *Ibid.*

Judge Trott would have affirmed the grant of summary judgment to Chevron on two grounds. First, a person is not "qualified" to "perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him." Second, Chevron satisfied the ADA's "direct threat" defense, as interpreted by the EEOC to apply to workers who pose a threat to their own safety—an interpretation to which Judge Trott would have deferred under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). App., *infra*, 21a-23a.

Judge Trott protested that the majority's decision will "require employers knowingly to endanger workers," will generate obvious "legal peril" for employers, and will impose an "unconscionable" "moral burden" on them. App., *infra*, 23a. He predicted that "conflicting responsibilities under different labor laws" would now engender "long, expensive, and unpredictable litigation." *Ibid.* Judge Trott expressed hope that the clear conflict among the circuits "will compel Supreme Court review." *Id.* at 23a-24a.

REASONS FOR GRANTING THE PETITION

This Court should review the Ninth Circuit's decision because the circuits are split over the recurring issue whether a person who will suffer serious injury or death as a result of carrying out the essential functions of a job is "qualified" for that job within the meaning of the Americans with Disabilities Act, and because the Ninth Circuit rejected the interpretation set forth in regulations of the agency Congress charged with implementing the law. In addition, the Ninth Circuit's ruling

creates inconsistent obligations for employers under the ADA and federal and state worker-protection laws such as the Occupational Safety and Health Act. By forcing employers to be complicit in injury to their employees—a result that Congress plainly did not intend—the Ninth Circuit's decision opens businesses up to liability not only under these worker protection statutes, but also in state tort suits, and it creates debilitating practical problems in the workplace.

The Ninth Circuit's decision, which is incorrect under well established principles of statutory interpretation, throws businesses' efforts to comply with the ADA into confusion. This Court should grant certiorari to restore sensible and certain rules to this important area of disability and employment law, and to avoid the absurd result that an employer within the Ninth Circuit cannot now deny a job handling dangerous machinery to an epileptic who suffers uncontrollable seizures, remove an employee with uncontrollable vertigo from a job scaling high structures, or keep any employee from work that will certainly kill him because of his medical condition.

I. THE NINTH CIRCUIT'S DECISION CREATES MULTIPLE CONFLICTS WITH OTHER COURTS OF APPEALS AND CONTRADICTS EEOC RULES

Courts of appeals have recognized no fewer than three statutory bases under the ADA for a business to refuse to employ a person who would incur substantial harm to life or health in performing the essential functions of a job. First, a person who cannot perform essential job functions without endangering his health or life is not a "qualified individual" under section 12112(a), and so is not within the ADA's protections at all. Second, an employer's insistence that a person not pose a "direct threat" to his own safety is a permissible "qualification standard" for a job under section 12113(b), as interpreted by the EEOC in regulations and guidance. 29 C.F.R. § 1630.2(r). Third, an employer is more

generally entitled under section 12113(a) to establish and enforce "qualification standards" for a position that are "job-related and consistent with business necessity," including specifically "medical" and "safety" standards. 29 C.F.R. § 1630.2(q). The Ninth Circuit rejected each of these grounds for denying employment to someone whose condition makes the job he seeks dangerous to his health or life. Its decision also conflicts with directly relevant authority interpreting virtually identical provisions of the Rehabilitation Act, which increases the unsettling impact of this "bizarre" ruling. App., *infra*, 21a.

1. *Qualified individual*. The Ninth Circuit held that Echazabal was "qualified" for the plant helper position despite the fact that Echazabal's and Chevron's doctors agreed that the substances he would be exposed to on the job would harm or kill him. App., *infra*, 14a-18a. That holding is squarely in conflict with the Seventh Circuit's decision in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999).

In *Koshinski*, the plaintiff was fired from his job operating a blast furnace after he was diagnosed with degenerative osteoarthritis and his own and his employer's doctors concluded that he should not be exposed to the vibrations and high force, repetitive tasks involved in the job because that would "exacerbate his condition." 177 F.3d at 601. Relying on the medical opinions available to the employer at the time it made its decision, the Seventh Circuit rejected "Koshinski's self-destructive wish to return to this particular job" because "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from." *Id.* at 602-603. Koshinski therefore "could not perform the essential functions" of the position and was not "qualified to do the job." *Id.* at 603.

The Seventh Circuit found it unnecessary to address whether Koshinski's employer had a "direct threat" defense in these circumstances, because "[t]he 'direct threat' issue arises * * *

only after an ADA plaintiff has made out a prima facie case, as an employer's defense to the challenged adverse employment decision." Koshinski had not shown "that he was entitled to protection under the ADA" as a "qualified individual" in the first place. 177 F.3d at 603. See also *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 142-144 (1st Cir. 1997) (holding that risks to the safety of others could be considered "as part of the 'qualifications' analysis").

Clearly, the reasoning and result in *Koshinski* are at odds with the Ninth Circuit's decision here. The Seventh Circuit would have held that Echazabal—who produced no contemporaneous medical evidence that he could do the plant helper job without harm to himself—had failed to make out a *prima facie* case that he was "qualified," and hence was outside the scope of the ADA's protection.

2. *Direct threat.* As the Ninth Circuit acknowledged (App., *infra*, 5a, 11a-12a), its holding that an employer may not require as a "qualification standard" that a person not pose a "direct threat" to his own health or safety conflicts with EEOC regulations and with decisions of other circuits applying the EEOC's regulations.

The EEOC "has authority to issue regulations to carry out the employment provisions in Title I of the ADA." *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 478 (1999). Exercising that authority in 1991 shortly after the ADA was adopted, the EEOC promulgated regulations interpreting sections 12113(a) and (b), which create a defense to liability when an applicant or employee fails to satisfy appropriate "qualification standards." 56 Fed. Reg. 35726, 35730 (July 26, 1991). Those regulations define "qualification standards" to mean "personal and professional attributes including * * * physical, medical, safety and other requirements established by a covered entity" as eligibility requirements for the job. 29 C.F.R. § 1630.2(q). These regulations also provide that the qualification standard

defense is satisfied where an applicant or employee poses "a significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." *Id.* § 1630.2(r) (emphasis added). The EEOC explained that including threats to the "health or safety of the individual" as a defense "is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act." 56 Fed. Reg. at 35730.

The EEOC has also emphasized in guidance that "[a]n employer may require that an individual not pose a direct threat of harm to his or her own safety or health." EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-14 (Jan. 1992), C.A. App. 549. The determination that such a direct threat exists must be based—like Chevron's determination here—on "valid medical analyses" showing "specific risk" to the "particular individual," not on "stereotypes, patronizing assumptions," or "generalized fears." *Ibid.* Hence, for example, an employer is not required "to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment." *Ibid.*

The Ninth Circuit majority recognized that "Title I contains an explicit grant of regulatory authority to the EEOC," acknowledged that the EEOC's "implementing regulations * * * state that an employer may assert a 'direct threat' defense with respect to individuals who pose a threat only to their own health or safety," but "reject[ed]" that interpretation on the theory that it is inconsistent with the ADA's language and legislative history. App., *infra*, 11a-12a & n.8. The Ninth Circuit's rejection of a consistent, decade-old interpretation, formally promulgated by the agency Congress charged with implementing the ADA, itself warrants this Court's intervention.

Unlike the Ninth Circuit, other courts of appeals have explicitly followed the EEOC's regulations. For example, relying on ADA section 12113 and 29 C.F.R. § 1630.2(r), the Eleventh Circuit has held that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety." *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). Applying that standard, the court affirmed the award of summary judgment against an epileptic employee. The court observed that the employee, who was at "significant risk" of having "seizures on the job" that were not controlled by medication, "sat on a platform above fast-moving press rollers" and "worked next to exposed machinery that reached temperatures of 350 degrees." *Id.* at 447-448. See also *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832, 834-836 (11th Cir. 1998) (a line cook who used hot equipment and slicing machines and who experienced epileptic seizures on the job was a "direct threat" to himself and others; summary judgment for employer); *EEOC* v. *Blue Cross Blue Shield*, 30 F. Supp. 2d 296, 306-307 (D. Conn. 1998) (an employer who reasonably determined that an applicant for a burdensome kitchen job would face "potentially serious health risks, including stroke, heart attack, or death," could "appropriately rescin[d]" its job offer pursuant to 29 C.F.R.. § 1630.2(r)).

The Tenth Circuit reached the same conclusion in *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000). There, the defendant fired an employee with psychiatric disorders "who worked with explosives and who harbored a grudge against his supervisor, threatened suicide and perhaps injury to others." *Id.* at 1294. Citing 29 C.F.R. § 1630.2(r) and the Eleventh Circuit's decision in *Moses*, the court affirmed summary judgment in favor of the employer because "[u]nder the ADA it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself *or* others," and because the employer's doctors had reasonably concluded that the employee presented "a direct safety threat to

himself and to the other workers." *Id.* at 1288, 1290, 1292 (emphasis added).

3. *Safety-based qualification standards*. The EEOC has taken the position that threats to self or others must be analyzed in terms of the "direct threat" defense and are not otherwise relevant under the ADA. See *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 (1999). This Court in *Albertson's* "questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one," but had "no need to confront the validity of th[at] reading." *Id.* at 569 n.15; see also *id.* at 578 (Thomas, J., concurring) (suggesting that safety issues "might also be relevant to the question whether respondent was a 'qualified individual'"). This case squarely presents the issue reserved for future decision in *Albertson's*, as to which the circuits are in conflict.

The Ninth Circuit held that satisfying the demands of the "direct threat" defense is the "exclusive" way in which employers may take account of safety concerns, reasoning that otherwise "definitional sleight-of-hand" would "circumvent" the limits of the defense, including Congress's supposed "decision to exclude a paternalistic risk-to-self defense." App., *infra*, 14a, 16a. The Ninth Circuit noted, however (*id.* at 17a n.11), that other courts of appeals disagree. As we have already demonstrated (*supra*, pp. 13-14), the First and Seventh Circuits held in *Amego* and *Koshinski* that safety risks may prevent a person from being a "qualified individual" within the meaning of ADA section 12112(a), precluding any need to consider the "direct threat" defense. Recently, the Fifth Circuit agreed that "safety requirements are not exclusively cabined into the direct threat test." *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000). Rather, "[i]n cases where an employer has developed a general safety requirement for a position"—as Chevron did with regard to its plant helper position—"safety is a qualifi-

cation standard no different from other requirements defended under the ADA's business necessity provision," section 12113(a). *Id.* at 874.

Unlike the Ninth Circuit, the First, Fifth, and Seventh Circuits thus recognize that safety issues may be addressed either as part of the section 12112(a) inquiry into whether a person is a "qualified individual" (*Amego*, *Koshinski*) or as part of a "qualification standard" authorized by section 12113(a) (*Exxon*). This case presents an ideal vehicle to address the issue left open in *Albertson's* and to end confusion in the lower courts over how safety requirements fit into the ADA's scheme.[4]

4. *Rehabilitation Act precedents.* This Court has made clear that construction of the ADA is to be "informed by interpretations of parallel definitions" in the Rehabilitation Act, because Congress' repetition of those provisions in the ADA indicates its "intent to incorporate [those provisions'] administrative and

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[4] The Ninth Circuit majority purported to distinguish *Amego* and *Exxon* on the ground that both involved claims that an individual posed a threat to others, not himself. App., *infra*, 17a n.11. In fact, that makes the conflict even more compelling. The First and Fifth Circuits held that qualification standards requiring that a person not pose a risk to others are not cabined by the "direct threat" defense, even though the statute describes the defense in terms of "a direct threat to the health or safety of other individuals in the workplace" (§ 12113(b)). Those circuits would hardly treat qualification standards requiring that a person not pose a risk to *himself* as restricted to the "direct threat" defense when the statutory provision creating that defense makes no mention at all of threats to self. As we discuss below, *infra*, Part II, the fact that threats to self are *not* mentioned in section 12113(b) strongly suggests that they should be analyzed instead under sections 12112(a) and 12113(a). The Ninth Circuit's attempted distinction in any event does not account for *Koshinski*, which analyzed a threat to self under section 12112(a)'s "qualified individual" rubric, and ignores the fact that the suicidal plaintiff in *Amego* also posed a threat to herself.

judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 631, 645 (1998); see also 42 U.S.C. § 12201(a); 29 U.S.C. § 794(d). The Ninth Circuit's ruling, however, contradicts other courts of appeals' and the EEOC's interpretation of virtually identical provisions of the Rehabilitation Act.

Like ADA section 12112(a), section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), extends protection to "qualified" individuals with a disability. Since 1978, EEOC regulations have defined that term to mean a person who "can perform the essential functions of the position in question without endangering the health and safety *of the individual* or others." 43 Fed. Reg. 12293, 12295 (Mar. 24, 1978) (emphasis added); 29 C.F.R. § 1614.203(a)(6) (2000). Courts of appeals prior to passage of the ADA likewise interpreted section 504's "qualified individual" language to exclude persons who posed a significant risk to themselves. *E.g.*, *Doe* v. *New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981) (if a student's mental disorder would result in a relapse into "behavior harmful to herself and others," including suicidal and other self-destructive acts, she would not be "qualified" for admission to medical school; Congress did not intend "to force institutions to accept * * * persons who pose a significant risk of harm to themselves or others"). Thus, when Congress enacted ADA section 12112(a), the terms it used had a settled regulatory and judicial interpretation, which Congress "inten[ded] to incorporate." *Bragdon*, 524 U.S. at 645; see 1 House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 485 (Comm. Print 1991) ("Leg. Hist.") (the ADA "is based on the same standard for 'qualified' person with a disability that has existed for years under the Rehabilitation Act"); see also *id.* at 71, 100, 124.

The courts of appeals continue consistently to hold that persons who would harm themselves in carrying out the essential functions of the job are not "qualified individuals" within the meaning of Rehabilitation Act section 504(a). See,

e.g., *Knapp* v. *Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996) (student with heart condition who would risk death playing basketball was not qualified for university's basketball program); *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1393-1395 (5th Cir. 1993) (person with diabetes or uncorrectably impaired vision is not "qualified" for a driver's job that "presents a genuine substantial risk that he could injure himself or others"); *Chiari* v. *City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (a person with Parkinson's disease was not "qualified" to be a construction inspector; "a significant risk of personal injury can disqualify a handicapped individual from a job if the employer cannot eliminate the risk"). The Ninth Circuit erroneously dismissed this line of cases and the EEOC's regulation as "irrelevant to [its] inquiry" because they interpret the Rehabilitation Act rather than the ADA. App., *infra*, 16a n.10. This Court squarely held in *Bragdon* that judicial and regulatory interpretations of Rehabilitation Act language repeated in the ADA are highly pertinent to understanding the ADA. The conflict between the Ninth Circuit's interpretation of the term "qualified individual" in the ADA and the EEOC's and other courts of appeals' interpretation of the same provision in the Rehabilitation Act warrants this Court's review.[5]

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[5] Contrary to the Ninth Circuit's ruling (App., *infra*, 16a n.10), Congress' inclusion of the "direct threat defense" in ADA section 12113(b) does not show that it intended to depart from the Rehabilitation Act understanding of the term "qualified." Had that been Congress' intent, it would have said so, rather than simply reenacting the "qualified individual" language of the Rehabilitation Act that had consistently been interpreted to permit exclusion of persons whose performance of the job would cause harm to themselves. Moreover, a 1988 amendment added an explicit "direct threat" provision to the Rehabilitation Act that denied protection to persons with communicable diseases who "would constitute a direct threat to the health or safety of other individuals." 29 U.S.C. § 705(20)(D). As the decisions cited in the text demonstrate, courts understood that the existence of this provision did not change the meaning of the term "qualified."

5. Unless this Court resolves these serious conflicts now, employers in the Tenth and Eleventh Circuits will be able to rely on EEOC regulations defining the "direct threat" defense to encompass threats to self; employers in the First, Fifth, and Seventh Circuits will be able to deny employment to persons who pose a threat to themselves because they are not "qualified" or fail safety-based "qualification standards"; but businesses in the Ninth Circuit will have to employ workers who will suffer injury or death on the job. Nationwide businesses with unified employment policies will as a practical matter have to comply with the Ninth Circuit's ruling everywhere. Moreover, any company doing business within the Ninth Circuit may be sued there for ADA violations, wherever those violations are alleged to have occurred, and so will potentially be subject to the Ninth Circuit's misconstruction of the Act. Wasteful litigation over the question presented also is sure to occur in circuits that have not yet addressed the issue. This Court should grant certiorari to end this confusion and ensure uniform application of the ADA throughout the Nation.

II. THE NINTH CIRCUIT'S DECISION DISREGARDS THE ADA'S PLAIN LANGUAGE AND NULLIFIES CONGRESSIONAL INTENT

According to the Ninth Circuit majority, threats to a worker's own health have no relevance under the ADA: the "direct threat" defense is the "exclusive way" in which threats to health may be taken into account, and that defense applies only when harm is threatened to *others*. App., *infra*, 14a. That faulty interpretation does not fit the plain language of the ADA, is contradicted by well established canons of statutory interpretation, and is refuted by the legislative history. It fails to give deference to the EEOC's reasonable interpretation to the contrary. It also relies on a patent misreading of this Court's Title VII jurisprudence. Absent this Court's intervention, the Ninth Circuit's "Pickwickian" decision will lead to "absurd results" that undermine worker protection laws and force

unwilling employers to assist workers in disruptive and demoralizing acts of self-destruction. *Id.* at 23a.

1. Three provisions of the ADA deal with a person's qualification for employment. First, the statute's primary bar on discrimination against the disabled, section 12112(a), extends protection only to a "qualified individual with a disability," defined as a disabled person who "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Second, the Act provides that it is a defense to liability that a disabled person has been screened out of a job by the application of "qualification standards" that are "job-related and consistent with business necessity." *Id.* § 12113(a). Finally, the Act addresses a particular "qualification standard," specifying that an employer "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b); see also § 12111(3) (defining "direct threat" as a "significant risk to the health or safety of others").

The sum total of the Ninth Circuit's textual analysis was to observe that section 12113(b) does not mention threats to self, and to conclude under the canon of interpretation *expressio unius est exclusio alterius* that threats to self therefore cannot be included within the "direct threat" defense. App., *infra*, 6a-7a. The *expressio unius* maxim, however, "serves only as an aid in discovering the legislative intent when that is not otherwise manifest," and here "too much is claimed for it." *United States* v. *Barnes*, 222 U.S. 513, 519 (1912).

By its plain terms, section 12113(b) sets forth only one example of a permissible qualification standard: a qualification standard *"may include"* a requirement that others not be put at risk. The provision therefore does not purport to be an exclusive list of safety-related qualification standards; it merely removes doubt that avoiding harm to others is *one* valid qualification standard. Section 12113(b) says *nothing else* about the meaning

of the terms "qualification standard" and "qualified individual" in the Act's other provisions. See *Albertson's*, 527 U.S. at 569 (section 12113(b) "appears to be a permissive provision"); *Christensen* v. *Harris County*, 529 U.S. 576, 587-588 (2000) (the term "may include" is "plainly permissive"); *Smith* v. *United States*, 508 U.S. 223, 230 (1993) ("It is one thing to say that [a phrase] *includes* [one use]. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use") (emphasis in original). Because section 12113(b) expressly is *not* exclusive and in no way limits the scope of sections 12112(a) or 12113(a), the Ninth's Circuit's reliance on the *expressio unius* maxim was misplaced.

2. The plain language of the ADA shows that posing a danger to self may disqualify a person for employment. The term "qualified" means "fitted" by "endowments * * * for a given purpose" or "having complied with the specific requirements * * * for an * * *employment." Webster's Third New Int'l Dictionary (1971). It is contrary to common usage and common sense to suggest that a person whose medical condition threatens injury or death at a particular job is "fitted" for that job; he is plainly *unfitted*. Also, where an employer has specified the environmental conditions an employee must be able to tolerate to do a job—as the ADA expressly permits (42 U.S.C. § 12111(8)) and as Chevron did here—an employee who will be injured or killed by those conditions obviously has not "complied with the specific requirements" for the job. Similarly, the term "qualification standards" in section 12113(a) is broad enough to encompass a "standard" requiring that a person be able to do the job in question without suffering serious harm or death. The EEOC has recognized as much by interpreting "[q]ualification standards" to include "personal * * * attributes" including "medical [and] safety" requirements established by an employer "which an individual must meet in order to be eligible for the position" (29 C.F.R. § 1630.2(q)), an interpretation that is entitled to deference under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984).

3. Well established canons of statutory construction confirm that a person who would pose a serious risk to his own health or life in a job is not qualified for that job. First, as we have already explained (*supra*, pp. 18-19), this Court has held that the ADA is to be construed in light of judicial and regulatory interpretations of the Rehabilitation Act. Congress clearly intended that the ADA incorporate principles embodied in the Rehabilitation Act and its regulations, and that the two laws be construed to avoid "inconsistent, conflicting standards." 1 Leg. Hist. 71, 100, 124. Accordingly, the ADA and Rehabilitation Act are to be construed *in pari materia*. See 2B N. Singer, Statutes and Statutory Construction § 51.03 (6th ed. 2000).

Both before and after passage of the ADA, courts of appeals have interpreted the concept of a "qualified individual" in the Rehabilitation Act to exclude a person who will be seriously harmed by the job as the result of a medical condition. See *supra*, pp. 19-20. The EEOC likewise has long defined a "qualified" person for purposes of the Rehabilitation Act as a person who can do the job "without endangering the health and safety of the individual." 43 Fed. Reg. at 12295. Interpreting the ADA's "qualified individual" provision *in pari materia* with the virtually identical provisions of the Rehabilitation Act and its implementing regulation confirms that a person who poses a significant risk to self is not "qualified" and therefore is outside the protection of the ADA. See *Koshinski*, 177 F.3d at 603.

In addition, it is well settled that courts should not interpret statutes to needlessly conflict with other federal laws or to produce absurd consequences. *E.g.*, *Moragne* v. *States Marine Lines*, 398 U.S. 375, 400-402 (1970); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994); 2B N. Singer, *supra*, § 53.03. The Ninth Circuit's construction of the ADA does lead to "absurd results." App., *infra*, 23a. To begin with, it conflicts with "longstanding laws mandating workplace safety." *Id.* at 22a. The Occupational Safety and Health Act imposes a duty on every employer to "furnish to *each* of his

employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (emphasis added). The Occupational Health and Safety Administration has explained that this obligation applies equally to the employment of disabled persons. See OSHA, Standards Interpretation, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html ("OSHA's policy is [that] *if* an employee can perform their job functions *in a manner which does not pose a safety hazard to themselves* or others, the fact they have a disability is irrelevant") (emphasis added).

For example, OSHA standards limit the employment of a fireman with heart disease, epilepsy, or emphysema; require that employees with sores not work in spray-finishing operations; and mandate removal of employees who exceed specified blood levels of lead and other substances from jobs involving exposure to those substances. See 1 OSHA Comp. Guide (CCH) ¶ 1161, at 1585-1586 (2000). State laws likewise impose obligations on employers to keep all of their workers safe, often providing criminal as well as civil penalties for failing to do so. See App., *infra*, 21a-22a; Cal. Lab. Code § 6402 ("No employer shall * * * permit any employee to go or be in any employment or place of employment which is not safe and healthful"). Yet the Ninth Circuit labels such worker protection policies "paternalistic," and allows an employer to deny a sick worker employment only when he reaches the point of being "unable to perform [the job's] duties." App., *infra*, 16a-17a. Given that "law books * * * overflow with statutes and rules designed by representative governments to protect workers from harm," this cannot be a correct interpretation of the ADA. *Id.* at 21a; *Albertson's*, 527 U.S. at 573 ("federal safety rules * * * limit application of the ADA as a matter of law"); 29 C.F.R. § 1630.15(e).

The Ninth Circuit's interpretation has other harmful consequences. It would expose employers to tort suits by injured workers and their families. The majority dismissed that risk on the ground that state tort laws inconsistent with ADA obligations would be impliedly preempted. App., *infra*, 13a. Judge Trott correctly observed, however, that relying on "the long, expensive, and unpredictable litigation road" to preempt state laws is "highly pernicious" when the issue can be avoided by a plain-language interpretation of the ADA, and is "a thin reed at best." *Id.* at 23a. As Judge Trott also noted, the Ninth Circuit's rule "requir[ing] employers knowingly to endanger workers" imposes an "unconscionable" "moral burden" on employers. *Ibid.* No reasonable interpretation of the ADA would impose a legal obligation on an employer knowingly to put a worker in the way of serious or fatal harm.

4. The ADA's legislative history contradicts the Ninth Circuit's ruling. The court relied on *a single floor statement* by Senator Kennedy that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." App., *infra*, 8a, quoting 136 Cong. Rec. 17377 (1990). Senator Kennedy commented that "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician." *Ibid.*

The Ninth Circuit attached too much weight to Senator Kennedy's personal and "frankly partisan statements about the meaning of" the direct threat defense, which "cannot plausibly be read as reflecting any general agreement." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 262 (1994); see, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"). Senator Kennedy's example of

paternalistic fear that a person with HIV would contract opportunistic infections—a speculative fear that could bar a worker from *any* job—is in any event far removed from the situation here. Chevron had specific, unanimous medical advice that documented conditions in the refinery would exacerbate Echazabal's liver disease and probably kill him.

"[T]he House and Senate commitee reports on the ADA flatly contradict" the court of appeals' reading of the statute. *Board of Trustees* v. *Garrett*, No. 99-1240, slip op. at 13 (Feb. 21, 2001). Congress aimed in the ADA to bar decisionmaking about employment of disabled persons based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, [and] pernicious mythologies." 1 Leg. Hist. 125 (Senate Report). None of those improper motives formed the basis for Chevron's decision. It had specific, unrebutted medical reports that Echazabal would be seriously endangered by performing the plant helper job. Congress fully recognized that the results of a post-offer medical examination might "mak[e] the individual not qualified for the job." *Id.* at 137. The House Report thus states that, while "[g]eneralized fear about risks from the employment environment, such as exacerbation of the disability caused by stress," do not disqualify a person from employment, an employer may deny work based on "a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm." *Id.* at 347. The clear import of this passage is that a real and substantial risk of "exacerbation of the disability" is a proper ground to deny employment.[6]

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[6] The Ninth Circuit also incorrectly relied on *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). App., *infra*, 13a, 15a n.9. In *Dothard*—which held that women *may* be excluded from contact positions in a high-security male prison—this Court stated that "it is impermissible under Title VII to refuse to hire [on] the basis of

5. Once the relationship between sections 12113(a) and (b) is understood—the "direct threat" defense is a "subset" of the more general "qualifications standards" defense (1 Leg. Hist. 423)—the logic of the EEOC's "direct threat" regulation is evident. The EEOC determined in 1991, immediately after the ADA was adopted, that section 12113(a) "qualification standards" may properly include "personal attributes" including "medical [and] safety" requirements. 29 C.F.R. § 1630.2(q). Rather than treat those requirements separately from the "threat to others" qualification standard set forth in section 12113(b), the EEOC treated *all* medical and safety standards—whether directed to avoiding harm to others or to self—as subject to the same set of substantive and evidentiary rules, using the "direct threat" rubric. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). Although the threat to self and threat to others qualification standards have different statutory sources—sections 12113(b) and (a)

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stereotyped characterizations of the sexes." 433 U.S. at 333. Chevron's decision not to hire Echazabal was based not on stereotypes but individualized consideration of Echazabal's medical condition. *Johnson Controls* held that an employer violated Title VII when it barred women of childbearing age from jobs that involved contact with lead to protect their fertility and fetuses. Because lead also has a "debilitating effect * * * on the male reproductive system," singling out women was blatantly discriminatory. 499 U.S. at 198. Another federal statute prohibited discrimination based on the potential for pregnancy. *Id.* at 198-199. In addition, OSHA had concluded that there was no scientific basis to exclude women of childbearing age from jobs involving lead exposure, and the employer kept lead exposure levels below the maximum amount recommended by OSHA. *Id.* at 208. None of those factors is involved here. Speculative future harm to speculative future pregnancies of fertile women as a class is far removed from the specific, individualized medical advice given to Chevron that exposure to toxins in its refinery would exacerbate Echazabal's liver condition and probably kill him. The Ninth Circuit's misconstruction of *Dothard* and *Johnson Controls* is itself a reason to grant review.

respectively—the EEOC has elected to make them subject to a single set of regulatory requirements. That reasonable decision by the agency Congress specifically charged with implementing these provisions is entitled to deference under *Chevron*. The Ninth Circuit erred in refusing to defer to the EEOC's interpretation of the ADA's qualification standards provisions.

6. The remaining question is whether the Ninth Circuit erred in holding that the "direct threat" defense is the *exclusive* means to defend a decision not to hire a person because of medical risks. App., *infra*, 14a. The EEOC has taken the litigating position that threats to self and others are relevant only as a defense to liability and play no role in determining whether a person is "qualified" in the first place. This Court questioned that position in *Albertson's*, 527 U.S. at 569 n.15, because it irrationally "impose[s] a higher burden on employers to justify safety-related qualification standards than other job requirements." The Seventh Circuit has rejected efforts to cabin all safety-related inquiries within the "direct threat" defense, holding that an employee fails to make a *prima facie* showing that he is a "qualified individual" under section 12112(a) if he does not produce evidence "as of the time of the employment decision" that he would not be harmed by doing the job. *Koshinski*, 177 F.3d at 602-603. In such a case, there is no need to "reach the question of whether the [employer] had a valid defense": the employee simply is outside the Act's protections. *Id.* at 603. See also *Albertson's*, 527 U.S. at 578 (an ADA plaintiff "bears the burden of proving * * * that he is a qualified individual") (Thomas, J., concurring).

How threats to self and others are to be analyzed under the ADA is of exceptional practical importance in many suits filed in federal courts throughout the country. We believe that the correct analysis is the one adopted by the Seventh Circuit in *Koshinski*. Once the employer has determined by medical testing or otherwise that an applicant poses a significant risk of harm to self or others in performing the essential functions of

the job, the applicant has the burden of coming forward with evidence, reasonably available to the employer when the employment decision was made, that the applicant could perform those tasks safely. If the applicant fails to produce such evidence, he has failed to make out a *prima facie* case that he is a "qualified individual." If the applicant does satisfy his initial burden, the question then becomes whether the "direct threat to self or others" defense applies. This interpretation ensures that, before an applicant may pursue actual and punitive damages claims against an employer for an ADA violation, there is evidence that the employer had reason to believe the applicant could do the job without injuring or killing himself or others. Like the scheme used in Title VII disparate treatment cases, this "division of intermediate evidentiary burdens" would bring the "litigants and the court expeditiously and fairly" to the ultimate question whether unlawful discrimination has occurred. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.[7]

Respectfully submitted.

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[7] The court of appeals vacated the judgment as to Echazabal's Rehabilitation Act and FEHA claims and remanded those claims for reconsideration because "the district court treated the substantive standards for liability under [the ADA and those two] statutes as identical." App., *infra*, 18a n.12. In a separate opinion, the court reversed the grant of summary judgment to Chevron on Echazabal's state law interference with contract claim. *Id.* at 25a-29a. The court made clear, however, that its ruling as to that count too turned on its interpretation of the ADA: Chevron's letter to Irwin was not "justified" under the ADA, so Chevron had not made out the affirmative defense of justification. *Id.* at 28a-29a. Accordingly, reversal of the Ninth Circuit on the question presented would require a remand as to all of respondent's claims.

ROBERT P. DAVIS
EVAN M. TAGER
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

JON P. KARDASSAKIS
Hawkins, Schnabel, Lindahl & Beck LLP
600 South Figueroa Street
Suite 1500
Los Angeles, California 90017
(213) 488-3900

STEPHEN M. SHAPIRO
Counsel of Record
JAMES D. HOLZHAUER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

MARCH 2001

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIO ECHAZABAL, Plaintiff-Appellant,
v.
CHEVRON USA, INC.; IRWIN INDUSTRIES, INC.,
Defendant-Appellee.

No. 98-55551

Appeal from the United States District Court for the Central District of California; Lourdes G. Baird, District Judge, Presiding. No. CV-97-03498-LGB.

Argued and Submitted Nov. 3, 1999.
Submission Vacated Nov. 15, 1999.
Resubmitted Jan. 25, 2000.
Filed May 23, 2000.
Amended Sept. 26, 2000.

Before: BRIGHT,* REINHARDT, and TROTT, Circuit Judges.

Opinion by Judge REINHARDT; Dissent by Judge TROTT.

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

ORDER

The Opinion filed on May 23, 2000 is amended to include the attached dissent by Judge Trott.

OPINION

REINHARDT, Circuit Judge:

On this appeal, the principal question we consider is whether the "direct threat" defense available to employers under the Americans with Disabilities Act applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace. We conclude that it does not.

I.

Mario Echazabal first began working at Chevron's oil refinery in El Segundo, California in 1972. Employed by various maintenance contractors, he worked at the refinery, primarily in the coker unit, nearly continuously until 1996, when the events that gave rise to this litigation occurred.

In 1992, Echazabal applied to work directly for Chevron at the same coker unit location. After determining that he was qualified for the job, Chevron extended him an offer contingent on his passing a physical examination. A preemployment physical examination conducted by Chevron's regional physician revealed that Echazabal's liver was releasing certain enzymes at a higher rate than normal level. Based on these results, Chevron concluded that Echazabal's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. For that reason, Chevron rescinded its job offer. Nevertheless, Echazabal continued to work for Irwin, a maintenance contractor, throughout the refinery—including at the coker unit. Chevron made no effort to have him removed from his assignment.

After learning of the enzyme test results, Echzazbal consulted with several doctors and eventually was diagnosed with asymptomatic, chronic active hepatitis C. Throughout his treatment, Echazabal told each physician who treated him about the type of work that he did. In addition, at least one of his physicians was provided with a document that detailed the specific environmental hazards present in the vicinity of the coker unit at the refinery. None of these physicians advised Echazabal that he should stop working at the refinery because of his medical condition.

In 1995, Echazabal again applied to Chevron for a position at the coker unit. As it had done before, Chevron made Echazabal a job offer that was contingent upon his passing a physical examination. Once again, Chevron eventually rescinded its job offer on the ground that there was a risk that Exhazabal's liver would be damaged if he worked at the coker unit. Unlike in 1992, however, Chevron did not simply allow Echazabal to continue working for Irwin at the refinery. Instead, Chevron wrote Irwin and asked that it "immediately remove Mr. Echazabal from [the] refinery or place him in a position that eliminates his exposure to solvents/chemicals." As a result, Echazabal was no longer permitted to work at the Chevron refinery.

Immediately after losing his position at the refinery, Echazabal filed a complaint with the Equal Employment Opportunity Commission. He subsequently filed a complaint in state court that alleged, among other things, that both Chevron and the maintenance contractor had discriminated against him on the basis of a disability, in violation of the Americans with Disabilities Act (ADA). After Chevron removed the action to federal court, the district court granted Chevron's motion for summary judgment on all of Echazabal's claims. The court then stayed the proceedings between Echazabal and the maintenance contractor (it had denied the contractor's summary judgment

motion) and certified for appeal its grant of summary judgment in favor of Chevron.[1]

II.

On appeal, Chevron argues that it may defend its decision not to hire Echazabal on the ground that it reasonably concluded that Echazabal would pose a direct threat to his own health if he worked at the refinery. It acknowledges that, with respect to "otherwise qualified" individuals, the ADA prohibits employers from "using qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities." 42 U.S.C. § 12112(b)(6) (1994); *see also* 42 U.S.C. § 12113(a). Chevron contends, however, that its refusal to hire Echazabal falls under an affirmative defense that the ADA provides to this charge of discrimination. In the "defenses" section of the Act, the statute provides that an employer may impose, as a "qualification standard," "a requirement that an individual shall not pose a direct threat to the health or safety of *other individuals* in the workplace." 42 U.S.C. § 12113 (emphasis added).[2]

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[1] The district court also certified for appeal three other claims by Exhazabal on which it granted summary judgment for Chevron: a Rehabilitation Act claim, a claim under California's Fair Employment and Housing Act, and a claim that Chevron intentionally interfered with Echazabal's employment contract with the contractor for whom he worked. As we discuss below, see infra note 13, in this opinion we vacate the district court's grant of summary judgment as to the first two of these claims. In a separate memorandum disposition filed concurrently herewith, we also reverse the district court's grant of summary judgment with respect to the intentional interference with contract claim.

[2] The defenses section of Title I of the ADA reads in relevant part:

(a) In general

The question before us is whether the "direct threat" defense includes threats to one's own health or safety. That is, we must decide whether the provision permits employers to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety. As we noted recently in *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), "[w]e have not yet ruled on whether the direct threat defense includes threats to one's self."[3] *Id.* at 1247 n.1. In addition to being a question of first impression in this Circuit, the issue has received almost no treatment in other

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> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> (b) Qualification standards
>
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to health or safety of other individuals in the workplace.
>
> ....

42 U.S.C. § 12113. The subsection that sets forth the "direct threat" language does not explicitly set forth an affirmative defense to a claim of disability discrimination. Nevertheless, it is clear that Congress intended the provision to define the terms of such defense.

[3] We asked the parties and the amicus EEOC to be prepared to discuss, at oral argument, whether the direct threat defense includes threats to oneself. Following argument, we invited the parties and the EEOC to submit briefs on the question. While the parties submitted such briefs, the EEOC advised us that it did not wish to do so.

Circuits. While several cases do state, in passing dicta, that the direct threat defense includes threats to oneself, *see LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1997); *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Daugherty* v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995), only the Eleventh Circuit appears to have held that the defense encompasses such threats. *See Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). The Moses court provides us with no guidance, however, because it gives no explanation for its holding. Instead, it simply asserts, without analysis, that the ADA's direct threat defense applies to threats bto the disabled individual himself.[4]

In order to resolve the scope of the direct threat defense, we turn first to the language of provision itself. Here, that language is dispositive. The direct threat defense permits employers to impose a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to "other individuals in the workplace," the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense.[5] *Expressio unius est*

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[4] A district court in the Seventh Circuit has examined the question in detail. It concluded, as do we, that the direct threat defense does not apply to threats to oneself. *See Kohnke* v. *Delta Airlines, Inc.*, 932 F. Supp. 1110 (N.D. Ill. 1996).

[5] It is true that, in the Eleventh Amendment context, the Supreme Court has rejected a similar textual argument. Although the Eleventh Amendment specifies only that "citizens of another state" may not sue a state, the Court has held that states are immune from suit by citizens of the same state. *See Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 54 (1996); *Hans* v. *Louisiana*, 134 U.S. 1, 10 (1890).

exclusio alterius. Finally, the obvious reading of the direct threat defense as not including threats to oneself is supported by the definitional section of Title I, which states that "[t]he term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3) (emphasis added). The fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself. *Cf. United States Trustee* v. *Garvey, Schubert & Barer* (*In re Century Cleaning Servs., Inc.*), 195 F.3d 1053, 1057-1058 (9th Cir. 1999). For these reasons, we conclude that the language of the direct threat defense plainly does not include threats to the disabled individual himself.

Although we need not rely on it, the legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself. The term "direct threat" is used hundreds of times throughout the ADA's legislative history—in the final conference report, the various committee reports and hearings, and the floor debate. *See, e.g.*, H.R. Conf. Rep. No. 101-596, at 57, 60, 77, 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 566, 569, 586, 593. In nearly every instance in which the term appears, it is accompanied by a reference to the threat to "others" or to "other individuals in the workplace." Not once is the term accompanied by a reference to threats to the disabled person

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But see Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989); U.S. Const. amend. XI. Regardless of the merits of the Court's interpretation of the Eleventh Amendment, we decline to follow a similar approach here or to adopt so atextual a reading of the direct threat defense. Rather, we prefer to afford the statute its plain meaning.

himself. In addition, both the Report of the House Judiciary in the Report of the Committee on Education and Labor explain that the direct threat provision is intended to codify the Supreme Court's holding in *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273 (1987)—a case that defines "[t]he term 'direct threat' [to] mean[ ] a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." H.R. Rep. No. 101-485, pt. 3, at 34, 45-46 (1990) (emphasis added) (*citing Arline*), *reprinted in* 1990 U.S.C.C.A.N. 445, 457; see also H.R. Rep. No. 101-485, pt. 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. 303, 359. While the House Judiciary Report notes that the ADA extends the Arline standard "to all individuals with disabilities, and not simply to those with contagious diseases or infections," H.R.Rep. No. 101-485, pt. 3, at 45, *reprinted in* 1990 U.S.C.C.A.N. 445, at 468, it says nothing about extending the standard to cover a disabled person whose employment would be harmful to himself as opposed to other individuals. Finally, the following statement made by Senator Kennedy, a co-sponsor of the ADA, also strongly bolsters our reading of the statute:

> The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace-that is, to other coworkers or customers. . . . It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply "protecting the individual" from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

136 Cong. Rec. S9684-03, at S9697 (1990).[6] In short, the legislative history convincingly supports the unambiguous wording of the direct threat defense.

Congress's decision not to include threats to one's own health or safety in the direct threat defense makes good sense in light of the principles that underlie the ADA in particular and federal employment discrimination law in general. As Senator Kennedy noted in the statement quoted above, the ADA was designed in part to prohibit discrimination against individuals with disabilities that takes the form of paternalism. This goal is codified in the Act itself: in the "Findings" section of the ADA, Congress concluded that "overprotective rules and policies" are one form of discrimination confronting individuals with disabilities. 42 U.S.C. § 12101(a)(5); *see also* H.R. Rep. No.

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[6] We found but one discussion in the legislative history that could be read as contrary to the plain reading of the direct threat defense. The report of the House Committee on Education and Labor contains the following somewhat ambiguous passage:

> A candidate, undergoing a post-offer, preemployment medical examination may not be excluded, for example, solely on the basis of an abnormality on an x-ray. However, if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate. . .

H.R. Rep. No. 101-485, pt. 2, at 73-74, *reprinted in* 1990 U.S.C.C.A.N. 303, 355-56. The quoted language does not make it clear to whom such "substantial harm" might occur. In any event, this general discussion does not take place in the context of discussing the direct threat defense. When the House Committee report does discuss the direct threat defense specifically, it, like the other reports, states that the defense codifies the standard set forth by the Supreme Court in Arline. In the end, the evidence provided by this isolated passage is vastly outweighed by the substantial evidence to the contrary that appears throughout the legislative history.

101-485, pt. 2, at 74, *reprinted in* 1990 U.S.C.C.A.N. 303, 356 (noting that "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities").

More generally, courts have interpreted federal employment discrimination statutes to prohibit paternalistic employment policies. The Supreme Court's interpretation of Title VII in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), provides a good example of this principle. In *Dothard*, the Court stated that "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." 433 U.S. at 335. While the Court permitted the employer in that case to hire only male guards in contact areas of maximum security male penitentiaries, it did so only because more was at stake than the "individual woman's decision to weigh and accept the risks of employment." *Id.* Sex was a bona fide occupational qualification, the Court concluded, because the employment of a female guard would, due to the guard's sex, create a real threat to the safety to others if violence broke out. *See id.* at 336. In *Johnson Controls*, the Court reiterated "that danger to a woman herself does not justify discrimination." 499 U.S. at 202 (*citing Dothard*). The court there held that the threats of lead exposure to female employees' own reproductive health did not justify the employer's decision to exclude women from certain positions at a battery manufacturing plant. *See id.* at 206-07. Given Congress's decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk, it should come as no surprise that it would enact legislation allowing the same freedom of choice to disabled individuals.

Chevron makes two arguments as to why the direct threat provision should not be given its plain meaning. First, Chevron argues that we should defer to the EEOC's contrary interpretation of the ADA. The implementing regulations of Title I of the ADA promulgated by the EEOC do, as Chevron contends, state that an employer may assert a "direct threat" defense with respect to individuals who pose a threat only to their own health or safety.[7] *See* 29 C.F.R. § 1630.15(b)(2) (1999) ("The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." (emphasis added)); 29 C.F.R. § 1630.2(r). Our determination whether a particular regulatory provision is valid begins with an inquiry into whether we must defer to the agency's construction, and if so, what level of deference the agency interpretation is owed. In the present case, we need not determine what level of deference Title I regulations are due, because we would reject the EEOC's regulatory interpretation of the statutory "direct threat" provision even were we to conclude that *Chevron* deference is appropriate.[8] Under

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[7] While we invited the EEOC, as amicus, to file a brief commenting on the validity of its regulatory interpretation, it declined to do so. *See supra* note 3.

[8] While we need not decide what level of deference the regulations implementing Title I are due, we note that Congress explicitly required the EEOC to issue regulations implementing Title I. *See* 42 U.S.C. § 12116 ("Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter [Title I] . . . ."). *Chevron* sets forth the level of deference that "should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. In fact, with respect to Title II of the ADA, we have held that *Chevron* governs review of regulations promulgated by the Attorney General because "Congress required the

Chevron, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999). As we concluded above, the intent of Congress is clear: the language of the direct threat defense plainly expresses Congress's intent to include within the scope of a § 12113 defense only threats to other individuals in the workplace. Accordingly, we reject the EEOC's contrary interpretation.

Second, Chevron suggests that we must ignore Congress's clear intent because forcing employers to hire individuals who

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Attorney General to promulgate regulations implementing Title II." *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1172-73 (9th Cir. 1999); *see also Dare* v. *California*, 191 F.3d 1167, 1172 (9th Cir. 1999); *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996).

The regulations implementing Title I of the ADA present a different deference question than that confronted by the Supreme Court in its recent ADA decisions. In *Sutton* and *Kirkingburg*, the Supreme Court reserved the question whether, and to what extent, the regulations and interpretive guidance "promulgated by the EEOC relating to the ADA's definitional section, 42 U.S.C. § 12102," are entitled to deference. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162, 2167 n. 10 (1999); *see also Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 2151 (1999); *Broussard* v. *University of Cal. at Berkeley*, 192 F.3d 1252, 1256 n.2 (9th Cir. 1999) (reserving same question). As the Supreme Court specifically noted, however, "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA, *see* §§ 12101-12102, which fall outside Titles I-V." *Sutton*, 119 S. Ct. at 2145. Unlike the generally applicable provisions considered in *Kirkingburg* and *Sutton*, Title I contains an explicit grant of regulatory authority to the EEOC.

pose a risk to their own health or safety would expose employers to tort liability. Because Chevron has not argued that it faces any costs from tort liability, this question is not properly before us. *See Johnson Controls*, 499 U.S. at 210. Nevertheless, we should note that, in *Johnson Controls*, the Supreme Court strongly suggested that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law. The Court stated that "we have not hesitated to abrogate state law where satisfied that its enforcement would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Johnson Controls*, 499 U.S. at 209-10 (internal quotation marks omitted). Therefore, given that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health or safety may be threatened by the job, state tort law would likely be preempted if it interfered with this requirement. Moreover, we note that Chevron's concern over an award of damages reflects a fear that hiring a disabled individual will cost more than hiring an individual without any disabilities. The extra cost of employing disabled individuals does not in itself provide an affirmative defense to a discriminatory refusal to hire those individuals. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A) (requiring employers to accommodate disabled individuals, even when those accommodations impose additional costs, unless the employer can demonstrate that the accommodations "would impose an undue hardship on the operation of the business").

In short, the plain language of the direct threat provision is dispositive: Section 12113 does not afford a defense on the basis that the performance of a job would pose a direct threat to an employee's (or prospective employee's) own health or safety. *See* 42 U.S.C. § 12113.

III.

Chevron next contends that, even if the direct threat provision does not provide it with a defense to its actions, it may defend its decision not to hire Echazabal on the ground that, because of the risk of damage to his liver, he is not "otherwise qualified" to perform the job at issue. Put simply, Chevron's argument is that the § 12113 "direct threat" defense does not set forth the exclusive way in which it may defend its decision not to hire Echazabal because of the risk to his health.

We agree, of course, that the ADA does not require employers to hire individuals who are not "otherwise qualified." Only a person who is a "qualified individual with a disability" is protected from discrimination under the ADA. *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . ."). According to the Act, the term "qualified individual with a disability" means:

> [A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8) (emphasis added).

We do not agree, however, with Chevron's assertion on appeal that performing the work at the coker unit without posing a threat to one's own health or safety is an "essential function" of the coker unit job. Chevron argues that it is an essential function because "the record establishes that Chevron

did prepare a written description of the job before advertising it and it incorporated the need for an employee to be able to tolerate an environment including, among other things, hydrocarbon liquids and vapors, petroleum, solvents and oils." According to Chevron, the "requirement" of the job description that an employee not be susceptible to harm from the chemicals is an "essential function" of the job simply because Chevron has chosen to describe it as such.

While we give consideration to an employer's judgment as to what functions of a job are essential, see 42 U.S.C. § 12111(8), an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential function, merely by including it in a job description. Job functions are those acts or actions that constitute a part of the performance of the job. "The job" at the coker unit is to extract usable petroleum products from the crude oil that remains after other refining processes. The job functions of the "plant helper" position for which Echazabal applied consist of various actions that help keep the coker unit running. Chevron does nothing more than add a prohibited condition to these actual job functions when it asserts that the job functions at the coker unit consist of performing the actions that help keep the unit running without posing a risk to oneself. Were we to ignore the limits of the actual functions of the job at issue and permit Chevron to add to those functions any condition it chooses to impose in its written job description, the term "essential function" would be rendered meaningless.[9]

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[9] Chevron's argument is markedly similar to the argument made by the dissent in *Johnson Controls* regarding the word "occupation" in the term "bona fide occupational qualification," as used in Title VII of the Civil Rights Act. *See Johnson Controls*, 499 U.S. at 211 n.1 (White, J., concurring); *id.* at 201. In *Johnson Controls*, the majority rejected the dissent's interpretation, *see id.* at 201, 203-04, and described the fallacy of the argument as follows: "It is word play to

Moreover, Chevron's reading of "essential functions" would, by definitional slight-of-hand, circumvent Congress's decision to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work. Accordingly, we reject Chevron's interpretation of what may constitute an "essential function" of a job.[10]

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say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western airlines is to fly planes without crashing." *Johnson Controls*, 499 U.S. at 207 (quoting *Johnson Controls*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)).

[10] Chevron argues that, in spite of the fact that it would undermine the clear language of the ADA's direct threat provision, we should conclude that a personal safety requirement is a valid qualification standard because such a conclusion is supported by case law implementing the Rehabilitation Act. It is true that at least one Ninth Circuit Rehabilitation Act case appears to conclude that a disabled individual is not a "qualified handicapped person" if her employment would pose "a reasonable probability of substantial harm" to her. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985) (stating that a risk to self may prevent an individual from being "qualified," but holding that the district court applied a standard too lenient when it found that, because the individual's employment would pose "an elevated risk of injury," she was not a qualified handicapped person). *But cf. Bentivegna* v. *United States Dep't of Labor*, 694 F.2d 619, 622-23 & n.3 (9th Cir. 1982) (questioning, under the Rehabilitation Act, whether a risk of future injury to self would be "related to the performance of the job and . . . consistent with business necessity," but declining to "hold that a non-imminent risk of injury cannot justify rejecting a handicapped individual"). *Mantolete* does not affect our analysis, however, because it relies on a Rehabilitation Act regulation that is irrelevant to our inquiry. The *Mantolete* court relied on a Rehabilitation Act regulation that defined a "qualified handicapped person" as an individual who, among other things, is

Given that not posing a risk to one's own health or safety cannot in itself constitute an essential job function, it is clear that Chevron's reason for refusing to hire Echazabal is not related to Echazabal's ability to perform the essential functions of the job for which he applied.[11] Chevron has never contended that the risk Echazabal allegedly poses to his own health renders him unable to perform those duties. Nor would we accept such an argument in this case were Chevron to make it. Echazabal worked for Irwin at the coker unit, performing work similar to the job for which he applied, long after he was

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able to "perform the essential functions of the position in question without endangering the health and safety of the individual or others." 29 C.F.R. § 1613.702(f) (emphasis added); *see also Mantolete*, 767 F.2d at 1421. The Rehabilitation Act did not provide a statutory definition of the term "qualified handicapped person." Thus, the court deemed the regulations controlling. In contrast to the Rehabilitation Act, the ADA contains a statutory definition of the term "qualified individual with a disability," which is the ADA's equivalent of the Rehabilitation Act's "qualified handicapped person." *See* 42 U.S.C. § 12111(8). The statutory definition in the ADA does not mention threats to the health or safety of the individual or others. Rather, it requires only that the individual be able, with or without reasonable accommodation, to "perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Obviously, the ADA's statutory definition of the term "qualified individual with a disability" supercedes the Rehabilitation Act's regulatory definition of the analogous term.

[11] In the context of threats to others, as opposed to threats to self, a few circuits have addressed employer claims that a threat that an individual posed to others prevented that person from performing the essential functions of the job at issue. *See EEOC* v. *Amego, Inc.*, 110 F.3d 135, 142-44 (1st Cir. 1997); *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873-75 (5th Cir. 2000). Because these decisions deal with threats to others, they are irrelevant to our analysis.

diagnosed with hepatitis. There is no evidence that the health of his liver ever affected his ability to do the job. Had Echazabal failed during that period to perform the essential functions of his work, we seriously doubt that Chevron would have twice extended him contingent offers to work at the coker unit.

Accordingly, we hold that the risk that Echazabal's employment might pose to his own health does not affect the question whether he is a "qualified individual with disability."

IV.

For the foregoing reasons, we conclude that the ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk. Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake. The district court's grant of summary judgment to Chevron on Echazabal's ADA claim is reversed.[12]

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[12] As noted above, the district court also certified for appeal its grant of summary judgment in favor of Chevron on the Rehabilitation Act and FEHA claims. In granting Chevron summary judgment with respect to those claims, however, the district court treated the substantive standards for liability under all three statutes as identical. We note that this conclusion may well be correct with respect to the Rehabilitation Act. In 1992, Congress amended the relevant provision of the Rehabilitation Act—section 504—by adding the following subsection:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201-12204 and 12210), as such sections relate to employment. Rehabilitation Act Amendments of 1992, Pub.L. No. 102-569, § 506, 106 Stat. 4344, 4428 (amendments codified at 29 U.S.C. § 794(d)).

Thus, our reversal as to the ADA claim may well require reversal with respect to the Rehabilitation Act claim. Nevertheless, we leave it to the district court to determine initially whether summary judgment should be granted to Chevron as to the Rehabilitation Act and FEHA claims. Accordingly, we vacate the district court's grant of summary judgment with respect to those claims, and remand for reconsideration in light of our decision. In addition, because we reverse the district court's grant of summary judgment as to the ADA claim and vacate its grant of summary judgement as to the Rehabilitation Act and FEHA claims, we also reverse the district court's judgment that Echazabal's claim for punitive damages is moot.

REVERSED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion.

TROTT, Circuit Judge, dissenting:

Mario Echazabal sues over not getting a job handling liver-toxic substances, *i.e.*, "hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach." He was denied the job because he suffers from a chronic, uncorrectable, and life-threatening viral liver disease—Hepatitis C—that most likely will be aggravated by exposure to these hazardous materials to the extent that his life will be endangered.

Chevron first discovered Mr. Echazabal's condition in 1992 when he was examined by Dr. Philip Bailey. Dr. Bailey studied toxicology at the University of Texas and is Board Certified in preventative occupational medicine. Dr. Bailey concluded on the basis of an examination of Mr. Echazabal and lab tests that his liver function was "grossly abnormal" and that he should not be exposed to liver toxic chemicals or alcohol. Dr. Bailey's findings and conclusions were recorded in Chevron's records.

Some years later, on December 28, 1995, Chevron offered Mr. Echazabal a job in its El Segundo refinery, but the offer was contingent on the results of a standard pre-employment physical examination. Enter Dr. Kenneth McGill, Dr. Bailey's successor. As had Dr. Bailey, Dr. McGill worked at the refinery clinic and was familiar with the conditions and demands of the work at issue. On the basis of a thorough medical examination and a review of blood tests, Dr. McGill determined that the chemicals and solvents to which Mr. Echazabal would be exposed at the refinery would further damage his reduced liver capacity and seriously endanger his health and his life. About this concern, Dr. McGill consulted by telephone with Mr. Echazabal's personal treating physician, Dr. Zelman Weingarten. Dr. Weingarten reported to Dr. McGill that extended Interferon therapy had not cleared his patient's condition, and that exposure to hepatotoxic hydrocarbons was not recommended. Then, Dr. McGill discussed his findings and conclusions with Dr. T.L. Bridge, Chevron's Medical Director in San Francisco. Dr. Bridge agreed with Dr. McGill's and Dr. Bailey's assessments that Mr. Echazabal could not safely work as a plant helper in the coker unit at the refinery. Not a single doctor disagreed with this conclusion. Mr. Echazabal did not offer any evidence or information to the contrary. Accordingly, and because Mr. Echazabal did not pass the required physical examination for the job, the offer of employment was withdrawn.

Dr. Brian Tang, a separate medical specialist in occupational medicine subsequently hired by his immediate employer Irwin Industries, also came to the conclusion that Mr. Echazabal has a condition that will be "worsened by . . . exposure [to hepatotoxins], causing probable death." Eight laboratory tests support the doctors' reasonable medical judgment and Chevron's objective, individualized, and sensible decision not to give Mr. Echazabal the job. He now brings to court facially competing information, but this information was not in Chevron's hands when they made the decision he now claims is actionable. In fact, the information did not surface until this lawsuit, rendering it suspect at best. As we held in *Cook* v. *United States Dept. of Labor*, 688 F.2d 669 (9th Cir. 1982), medical evidence that surfaces after the decision has been made is of no moment in this context regarding the bona fides of the decision itself. What is at issue here is the manner in which Chevron made its decision, not whether lawyers could later find another doctor to say something else.

I agree with the district court that Mr. Echazabal has no case, and I do so for two primary reasons. First, Mr. Echazabal simply is not "otherwise qualified" for the work he seeks. Why? Because the job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him. To ignore this reality is bizarre. The EEOC's relevant regulation provides that "the term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. § 1630.15(b)(2).

Our law books, both state and federal, overflow with statutes and rules designed by representative governments to protect workers from harm. Long ago we rejected the idea that workers toil at their own peril in the workplace. "Paternalism" here is

just an abstract out-of-place label of no analytical help. Whether paternalism or maternalism, the concept is pernicious when it is allowed to dislodge longstanding laws mandating workplace safety. That battle was fought and lost long ago in our legislatures. In many jurisdictions, it is a crime knowingly to subject workers to life-endangering conditions. California Labor Code § 6402 expressly forbids an employer from putting an employee in harms way. In Arizona, an employer who fails to provide a safe workplace commits a felony. Ariz. Rev. Stats. Annot., Labor § 24-403, § 23-418. In effect, we repeal these laws with respect to this appellant, and to other workers in similar situations. So much for OSHA. Now, our laws give less protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards. Precisely the workers who need protection can sue because they receive what they need.

Second, Chevron has a defense to this action, known as the "direct threat" defense. 42 U.S.C. § 12113(b). The EEOC's implementing regulations, authorized by Congress, defines a "direct threat" to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced by reasonable accommodation. . . ." 29 C.F.R. § 1630.2(r) (Emphasis added). The EEOC's own Technical Assistance Manual on the employment provisions of the ADA states: "The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual wh would pose a 'direct threat' to health or safety." EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* § 4.4 (1992).

On these issues, the EEOC has rationally and humanely spoken. Under *Chevron U.S.A.* v. *Natural Resources Defense*, 467 U.S. 837, 844-45 (1984), we owe deference to the EEOC's

interpretation of the Act, but we have failed to acknowledge this responsibility. Contrary to what some might believe, we do not know more about this subject than the EEOC. Following the EEOC's guidance, Mr. Echazabal is not qualified for this work.

Chevron correctly points out that the majority's holding leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper. The possible examples of this Pickwickian ruling are endless. I doubt that Congress intended such a result when it enacted laws to protect persons with disabilities.

The ADA provides a defense to employers who can demonstrate that an accommodation constitutes an "undue hardship." 42 U.S.C. § 12112(b)(5)(A). I believe it would be an undue hardship to require an employer to place an employee in a life-threatening situation. Such a rule would require employers knowingly to endanger workers. The legal peril involved is obvious, and a simple human to human matter, such a moral burden is unconscionable.

The idea that conflicting responsibilities under different labor laws will be solved down the long, expensive, and unpredictable litigation road by the doctrine of implied preemption seems highly pernicious in this context, and a thin reed at best. Did Congress really intend to nullify state and federal workplace safety laws and render them impotent to protect workers in identifiable harms way? I doubt it. Does anti-paternalism trump basic safety concerns? This entire construct makes a house of cards look secure.

Finally, and fortunately, we have created a conflict with the Eleventh Circuit, which held that "an employer may fire a disabled employee if the disability renders the employee a 'direct threat to his own health or safety.'" *Moses* v. *American*

Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997). I say "fortunately" because this conflict will compel the Supreme Court—or Congress—to resolve this dispute—unless we do so ourselves by way of en banc review.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIO ECHAZABAL, Plaintiff-Appellant,

v.

CHEVRON USA, INC.; IRWIN INDUSTRIES, INC., Defendant-Appellee.

No. 98-55551

Appeal from the United States District Court for the Central District of California; Lourdes G. Baird, District Judge, Presiding. No. CV-97-03498-LGB.

Argued and Submitted Nov. 3, 1999—
Pasadena, California.
Submission Vacated Nov. 15, 1999.
Resubmitted Jan. 25, 2000.
Decided May 23, 2000.

Before BRIGHT,[1] REINHARDT, and TROTT, Circuit Judges.

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[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

MEMORANDUM[2]

In an opinion filed concurrently with this memorandum disposition, we reverse the district court's grant of summary judgment on Echazabal's claim under the Americans with Disabilities Act and remand for further proceedings. This memorandum disposition addresses Echazabal's appeal of the district court's grant of summary judgment on one of his state law claims—that Chevron is liable for intentionally interfering with his employment contract with Irwin. The district court granted Chevron's summary judgment motion on the ground that Echazabal "presented no admissible evidence in support of his contention that Chevron by its February 21, 1996 letter intended that the relation between Irwin and Echazabal be terminated."

In *Seaman's* v. *Standard Oil*, 686 P.2d 1158 (Cal. 1984) (in bank), the California Supreme Court held that intent to interfere with a contract "may be established by inference as well as by direct proof. Thus [the jury may] infer culpable intent from conduct 'substantially certain' to interfere with the contract." *Id.* at 767; *see also Ramona Manor Convalescent Hosp.* v. *Care Enters.*, 225 Cal. Rptr. 120, 124-26 (Ct. App. 1986) (finding that the jury's determination of intent supported by the evidence, and focusing on the existence of knowledge of the third-party contract). While the California Supreme Court later overruled *Seaman's* to the extent that *Seaman's* suggested that its holding applied to actions for tortious interference with prospective economic relations as well as to actions for tortious interference with existing contractual relations, it did not upset *Seaman's* holding with respect to existing contractual relations. *See Penna* v. *Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740

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[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

(Cal. 1995). In fact, the *Penna* court reinforced *Seaman's* holding with respect to existing contracts by "draw[ing] and enforc[ing] a sharpened distinction between claims for the tortious disruption of an existing contract and claims [for tortious interference with a] prospective contractual or economic relationship." *Id.* at 750. For the latter claims, the court held, the plaintiff cannot succeed in demonstrating intentional interference with prospective economic relations by introducing only evidence "that the defendant . . . knowingly interfered with the plaintiff's expectancy." *Id.* at 751. By adopting a stricter test for cases involving prospective economic relationships, the Penna court reinforced the Seaman conclusion that, with respect to an existing contract, a jury may infer an intent to interfere from the defendant's knowledge of the third-party contract accompanied by conduct "substantially certain" to interfere.

Summary judgment was inappropriate here because there is no dispute that Chevron had knowledge of Echazabal's employment contract with Irwin, and a genuine issue of material fact exists as to whether Chevron engaged in conduct "substantially certain" to interfere with that contract. First, Chevron obviously knew of Echazabal's employment contract with Irwin—had it not, it would have had no occasion to send a letter to Irwin requiring that it remove Echazabal from the refinery or move him to a position in which he would not be exposed to solvents and chemicals.

Second, a fact-finder could conclude, by drawing permissible inferences, that Chevron's actions were "substantially certain to interfere" with Echazabal's employment contract with Irwin. "Interference" includes inducing a disruption of the contractual relationship. *See Savage* v. *Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 314 (Ct. App. 1993). It also includes making the plaintiff's performance of the contract "more expensive or burdensome." *Ramona Manor*, 225 Cal. Rptr. 2d at 124. In this

case, it was substantially certain that Chevron's actions would disrupt Echazabal's relationship with Irwin and make his performance of his employment contract more burdensome. In response to Echazabal's EEOC filing, Irwin stated that it had no positions at the Chevron refinery (except for one clerk position) in which exposure to chemicals and solvents would not be likely. Accordingly, a fact-finder could conclude that Chevron's letter to Irwin made it certain that Echazabal would be removed from his employment at the refinery. In addition, a fact-finder could also conclude that Chevron's actions made it substantially certain that Echazabal would not obtain any work with Irwin. After it removed Echazabal from the Chevron refinery, Irwin, a general contractor providing maintenance and construction services to the petrochemical and energy industries, quickly determined that it would not assign Echazabal to a position at any refinery because of his condition. Moreover, as Irwin acknowledged, "there is very little non-refinery work Mr. Echazabal is qualified to perform and very few such opportunities available."[3] These facts are sufficient to preclude summary judgment.

Chevron argues in the alternative that summary judgment is appropriate because Chevron's communication to Irwin was "justified." Justification remains an affirmative defense to a charge of international interference with a contract. *See Seaman's*, 686 P.2d at 1165. However, "[i]f the means [employed to interfere with the contract] are unlawful, the interference cannot be justified and is beyond the reach of this

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[3] It appears that the few opportunities with Irwin that might conceivably have become available to Echazabal at some point were work opportunities that paid a substantially lower wage. Thus, even had Echazabal been offered such work and accepted it, Chevron's actions would have interfered with his employment contract by making that contract less valuable.

affirmative defense." *Savage*, 26 Cal. Rptr. 2d at 315. Interfering with the peformance of a person's employment contract on a ground prohibited by federal law would fall within this rule. Because we hold in the accompanying opinion that Chevron is not entitled to summary judgment with respect to whether its actions in refusing Echazabal employment at the refinery were in violation of federal law, there is also a genuine issue of material fact as to whether Chevron's actions in seeking to have Irwin prohibit him from working at the refinery were unlawful. Accordingly, summary judgment is not appropriate.

REVERSED and REMANDED for further proceedings consistent with this disposition.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARJO ECHAZABAL, Plaintiff-Appellant,

v.

CHEVRON USA, INC.; IRWIN INDUSTRIES, INC., Defendant-Appellee.

No. 98-55551

Appeal from the United States District Court for the Central District of California. D.C. No. CV-97-03498-LGB

[Filed December 12, 2000]

Before BRIGHT,[1] REINHARDT, and TROTT, Circuit Judges

ORDER

Judges Bright and Reinhardt voted to deny the petition for rehearing. Judge Reinhardt voted to deny the petition for rehearing en banc and Judge Bright so recommends. Judge Trott voted to grant the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the

[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

votes of the nonrecused active judges in favor of en banc consideration.

The petition for rehearing and petition for rehearing en banc are denied.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIO ECHAZABAL, Plaintiff,

v.

CHEVRON USA, INC.; IRWIN INDUSTRIES, INC.,
Defendant.

No. CV-97-03498-LGB (CWx)

ORDER GRANTING CHEVRON'S MOTION FOR SUMMARY JUDGMENT AND DENYING IRWIN'S MOTION FOR SUMMARY JUDGMENT

[Filed January 5, 1998]

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Defendants Chevron and Irwin's separate motions for summary judgment came on regularly for hearing on December 29, 1997. Having carefully considered the papers submitted and oral argument of counsel, the Court hereby GRANTS Chevron's motion for summary judgment, DENIES Irwin's motion for summary judgment, and GRANTS Irwin's motion for summary adjudication as to punitive damage claims.

This case arises from plaintiff Mario Echazabal's ("Echazabal") layoff from his position with Irwin Industries,

Inc. ("Irwin"), a maintenance contractor for Chevron U.S.A., Inc. ("Chevron"), following Chevron's withdrawal of a job offer to Echazabal, allegedly on the basis of Echazabal's condition of chronic active hepatitis.

Echazabal filed a First Amended Complaint ("1AC") against defendants Chevron and Irwin in Los Angeles Superior Court on April 8, 1997. The Notice of Removal was filed May 8, 1997. Plaintiff alleges the following causes of action against defendant Chevron only, except as noted: (1) violation of FEHA for disability discrimination, against Chevron and Irwin; (2) valuation of ADA (42 U.S.C. §§ 12101), against Chevron and Irwin; (3) violation of 29 U.S.C. §794; (4) violation of plaintiff's right to privacy under Cal. Const. Art. I; (5) violation of the Confidentiality of Medical Information Act, Cal. Civ. Code § 56; and (6) intentional interference with contractual relations. The 1AC seeks punitive damages for all causes of action. (1AC 22:1-11.)

On October 6, 1997, defendant Chevron filed its Motion for Summary Judgment. Plaintiff's Opposition was filed November 14, 1997. Reply was filed November 24, 1997.

On November 18, 1997, defendant Irwin filed its Motion for Summary Judgment. Plaintiff's Opposition was filed December 1, 1997. Reply was filed December 4, 1997.

II. FACTUAL BACKGROUND

The following facts are relevant to both defendants' Motions for Summary Judgment and are undisputed, except as noted.

From in or about December, 1986 to on or about February 28, 1996, plaintiff Mario Echazabal was an employee of defendant Irwin Industries, Inc., at defendant Chevron's refinery in El Segundo, California ("the refinery"). (Irwin's Statement of Uncontroverted Facts and Conclusions of Law (hereafter "Irwin's Facts") 1.) Irwin is an independent contractor

performing maintenance services at the refinery. (Chevron's Statement of Uncontroverted Facts and Conclusions of Law (hereafter "Chevron's Facts") 2.) Echazabal's training and background were in the job areas of pipefitting and firewatching. (Irwin's Fact 2.)

In 1992, Echazabal submitted an application to Chevron. In connection with that application, Echazabal underwent a medical examination in October, 1992, conducted by Dr. Philip Baily ("Baily"). (Plaintiff Decl. ¶4-5.) As a result of that medical examination, Dr. Baily concluded as of October 13, 1992 that Echazabal had an uncorrectable liver abnormality, and should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problems. These recommendations were submitted to Chevron's personnel department. (Baily Depo. 13:11-15:1, 26:4-11, 30:4-9, 44:8-20, 47:11-48:4.)[1]

In or around November 1993, Dr. Kenneth McGill ("McGill"), Dr. Baily's successor, concurred with Dr. Baily's finding that plaintiff's liver condition was uncorrectable and that plaintiff should not be exposed to solvents and other liver toxic chemicals. (McGill Depo. 23: 6-13, 24:4-25:22.) A medical clearance letter sent to Dr. Baily by Dr. Mordo Suchov, dated November 10, 1993, states, "there is no limitation of his ability to work." (Pl. Supp. Decl. Exh. E p. 21.) However, this letter does not evaluate plaintiff's medical condition in light of any particular job description.

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[1] In Opposition to Irwin's MSJ (although not to Chevron's), plaintiff has presented a letter from a Dr. Nga Ha to Dr. Baily, dated April 5, 1993, which places no work restrictions on plaintiff as to the job plaintiff had applied for at that time. (Pl. Supp. Decl. Exh. E, p. 17.)

On October 11, 1995,[2] Echazabal applied for a plant helper position with Chevron at the refinery. (Chevron's Fact 1.) Prior to this application but after 1992, Drs. Baily and McGill received medical records and reports concerning Echazabal's condition. (Echazabal Decl. ¶8.) At the time Echazabal applied fro the job in 1995, he was working at the refinery as an employee on Irwin. (Chevron's Fact 2.) In that capacity, Echazabal performed similar job duties and was exposed to similar chemicals as would occur in the position of plant helper. (Echazabal Decl. ¶2, 4, 17; DiPadua Depo. 131-174; Saner Depo. 134:11-135:2.)

On December 28, 1995, Chevron offered Echazabal a plant helper position in the coker unit at the refinery subject to his completion of a pre-employment physical. (Chevron's Fact 3.) On January 2, 1996, Echazabal's pre-employment physical examination took place was conducted at the refinery clinic by Dr. McGill, a generalist "self-trained" in industrial medicine. (Chevron's Fact 4, Irwin's Issue 4, McGill Depo. 56:12-19.)

Echazabal suffers from chronic hepatitis C, a viral infection characterized by ongoing liver inflammation. (Fedoruk Decl. ¶5.) Dr. McGill reviewed Echazabal's medical records, including laboratory results from blood samples taken eight times between October, 1992 and January, 1996. Each of the blood tests showed elevated levels of liver function enzymes. (Chevron's 6.) It is disputed whether plaintiff's liver was in fact functioning properly, despite these elevated enzyme levels. (Fedoruk Decl. ¶8, Gitnick Decl. ¶7-8.) It is disputed whether such elevated enzyme levels reflect ongoing liver cell damage (McGill Decl. ¶11-12; Tang Depo. 54:21-55:8), or are simply evidence of liver inflammation and leaking of enzymes into the bloodstream, compatible with normal liver function (Fedoruk

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[2] This date incorrectly appears in Chevron's Facts and Echazabal's Responses as "October 11, 1997."

Decl. ¶8, Gitnick Decl. ¶7,9). Echazabal's enzyme levels had not improved despite years of treatment with interferon, the standard treatment for hepatitis C. (McGill Decl. 7, 9, 13.) Plaintiff has also presented evidence that although he has chronic active hepatitis C, he has no symptoms of liver failure, and there are no clinical findings on physical examination which demonstrate impairment of liver function. Plaintiff has presented evidence that blood tests which assess the ability of his liver to maintain normal body functions, including tests which measure albumin and prothrombin production by the liver, have been normal overall. (Fedoruk Decl. ¶5-8; Gitnick Decl. ¶6-14.) Although it is not clearly stated in the relevant declarations, the medical evidence creating these disputed issues is contained in opinions which appear to have been generated sometime after February, 1996. The Declarations of Drs. Fedoruk and Gitnick are both dated November, 1997, and include a review of depositions and declarations pertaining to this case, all of which are dated 1997. (Fedoruk Decl. ¶4, Gitnick Decl. ¶4.)

Dr. McGill concluded that Echazabal's chronic liver condition was not correctable. (McGill Decl. ¶14.) Dr. McGill reviewed the written job summaries for the plant helper position in the coker unit, for which Echazabal had applied. (Chevron's Fact 10.) Chevron prepares and maintains such summaries for every job at the refinery. These summaries list the functions of the position in question and the environmental conditions an employee will encounter, although they do not designate the specific chemicals, solvents, or liquids, or concentration levels thereof, to which a person in a given job will be exposed. These summaries are used and relied on by the medical clinic when assessing whether applicants can safely perform the required functions of a particular job. (Chevron's Fact 11, McGill Decl. ¶7-8, Exh. 16-17 in support of Chevron's MSJ.) The summaries for the position Echazabal applied for list hydrocarbon liquids and vapors, acid, caustic, refinery waste

water and sludge, petroleum solvents, oils, greases and chlorine bleach in the work environment. (Chevron's Fact 12.)

At some time after January 2, 1996 and before February 6, 1996, Dr. McGill spoke with Dr. Zelman Weingarten, M.D., one of Echazabal's personal physicians, about whether Echazabal could safely be exposed to the substances present in the refinery. (McGill Depo. 41:12-21, 50:13-22.) Dr. Weingarten communicated to Dr. McGill that Echazabal should not be exposed to such substances. (McGill Depo. 44:24-45:24.) Dr. McGill had sent a letter to Dr. Weingarten making such an inquiry, which Dr. Weingarten had not yet received. (McGill Depo. 44:12-22.) Upon receipt of that letter, Dr. Weingarten replied in a letter dated February 28, 1996, which also memorialized the earlier conversation. (McGill Depo. 50:22-24.) The February 28, 1996 letter read, in pertinent part, as follows: "In your letter, it is mentioned that Mr. Echazabal has applied for return of his job and it is mentioned that 'this may entail exposure to hepatotoxic hydrocarbons.' This, of course, is recommended not to be the case." (Exh. 13 in support of Irwin's MSJ; Irwin's Fact 12; Chevron's Fact 21.) Dr. Weingarten was not informed by Dr. McGill about the specific chemicals to which plaintiff would be exposed, or the levels of concentration of those chemicals. (McGill Depo. 51:9-22, 53:9-54:20, 98:4-8.)[3]

Dr. McGill reviewed the medical history information provided by Echazabal identifying the substances to which he

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[3] The February 28, 1996 letter explicitly updates and clarifies a January 10, 1996 letter form Dr. Weingarten which stated that Echazabal "has no limitations....He does not pose a contagious problem." (Pl. Supp. Decl. Exh. E, p. 23.) The January 10, 1996 letter therefore does not undermine McGill's reliance on information received from Dr. Weingarten and memorialized in the February 28, 1996 letter.

had been regularly exposed in the preceding six moths at the refinery. Echazabal identified exposure to insulation materials, welding and soldering fumes, coker dusts, solvents, cleaning fluids, and engine exhaust. (McGill Decl. ¶7, Exh. 12 in support of Irwin's MSJ.) Dr. McGill came to the conclusion that the hydrocarbons, chemicals, and solvents to which Echazabal would be exposed working as a plant helper in the coker unit would be dangerous to his health, or would aggravate his chronic liver condition. (Chevron's Fact 15.) Defendants Chevron and Irwin have presented admissible evidence that such a danger existed. (Tang Depo. 46:16-25, 47:1-25, 48:1-25; McGill Depo. 99:6-20, 100:21-24, 103:17-22.) Plaintiffs have presented evidence (based on evaluations apparently undertaken after February, 1996) that plaintiff was at no greater risk than any of his co-workers. (Fedoruk Decl. ¶9, 11; Gitnick Decl. ¶8-12.)

On January 29, 1996, Dr. McGill discussed his conclusions with Chevron's Medical Director in San Francisco, Dr. Bridge. Dr. Bridge agreed with Dr. McGill's assessment that Echazabal could not safely work as a plan helper in the coker unit at the refinery. (Chevron's Fact 16.) Dr. McGill reached the same conclusions about appropriate work limitations as Dr. Baily had reached in 1992. (McGill Depo. 73:11-17.)

Dr. McGill reported to William Saner ("Saner"), Chevron Personnel Director, that "because of uncorrectable abnormality" [of liver function], if Echazabal were to be hired it would be subject to the work limitation, 'No exposure to solvents or other liver toxic chemicals.'" (Chevron's Fact 17; Exh. 15 in Support of Chevron's MSJ.) Dr. McGill also communicated to Saner that Dr. Weingarten had reached the same conclusion. (Saner Depo. 150:14-24.) Saner reviewed the written job summaries for the plant helper position in the coker unit. Exposure to hydrocarbons and chemicals is a necessary and inseparable part of the plant helper position. Based on these summaries, his own

knowledge of the position, and Dr. McGill's medical opinion, (including the supporting opinion of Dr. Weingarten), Saner made the decision to withdraw Echazabal's conditional job offer. (Chevron's Fact 18; Saner Depo. 28:10-22, 46:3-47:4, 49:1-51:24.) Saner had not himself seen monitoring records regarding chemicals at the refinery, and to his knowledge no one evaluated which specific toxins and/or hepatotoxins Echazabal would be exposed to. (Saner Depo. 84:5-8, 93:12-94:22, 101:10-104:23.) During 1993, 1994, and 1995, Chevron never determined the precise level of each liver toxic substance to which coker workers would be exposed. (RFA Nos. 26-29.)

On February 6, 1996, in a letter from Saner, Chevron withdrew Echazabal's conditional job offer. Echazabal was notified of this withdrawal on February 28, 1996. (Chevron's Fact 19, Echazabal Decl. ¶10.)

Chevron sent a letter to Irwin dated February 21, 1996 which stated, "Your employee Mr. Mario Echazabal recently applied for employment at the Chevron U.S.A. Products Company. . . . [T]he results of Mr. Echazabal's examination indicate that he has a medical condition that would restrict him from performing the tasks of the position we offered. The restrictions require that Mr. Echazabal not be exposed to solvents and certain chemicals. It is therefore, with regret, that we have withdrawn our offer of employment to Mr. Echazabal. Further, we must ask you to immediately remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." (Exh. 14 in support of Irwin's MSJ.) Chevron did not expect, and did not intend, that the employment relationship between Irwin and Echazabal would terminate as a result of the February 21, 1996 letter. (Chevron's Fact 33.)

It is disputed whether it was not until late February, 1996 that Irwin first learned of Echazabal's chronic liver condition.

Plaintiff reported "mild liver disease" in 1993 and treatment with interferon in 1995. (Echazabal Supp. Decl. Exh. Q; Minsky Supp. Decl. Ex. V.) Plaintiff has testified that he discussed "my liver condition . . . or the treatment I was undergoing" with his supervisors or someone from Irwin. (Echazabal Supp. Decl. ¶18-19.)

On or about February 28, 1996, Manfred Kiesser, Director of Human Resources for Irwin, complied with Chevron's instructions and, on behalf of Irwin, prohibited Echazabal from continuing to work in the refinery. (Kiesser Decl. ¶8-10.) Kiesser was not given any further information by Dr. McGill or Dr. Weingarten. (Kiesser Depo. 95:13-96:6, 108:19-109:24, 115:9-116:4, Exh. W to Minsky Supp. Decl.) After plaintiff's removal from the refinery, Kiesser sent Echazabal to the Long Beach Medical Clinic to determine Echazabal's work restrictions. (Kiesser Decl. ¶10-11, Echazabal Supp. Decl. ¶12.)

On or about March 8, 1996, Echazabal visited the Long Beach Medical Clinic. (Plaintiff Supp. Decl. ¶12.) It is disputed whether Echazabal was examined by Irwin's physicians, or seen by other medical personnel (non-physicians). (Chevron's Fact 20; Echazabal Decl. ¶12.) Brian Tang, M.D., who is board certified in occupational medicine and teaches that subject at USC Medical School, participated in the evaluation of Echazabal's test results. Dr. Tang concluded that exposure to liver toxins would harm and probably kill Echazabal. (Chevron's Fact 20.) Kiesser has testified that he learned from Tang that plaintiff could not safely work at any position in the refinery, though Tang does not specifically recall the communication. (Kiesser Depo. 95:8-12; Tang Depo. 50.)

Plaintiff has presented admissible evidence that Tang's conclusion is erroneous.[4] (Fedoruk Decl.; Gitnick Decl.)

It is disputed what communication took place between Irwin and Echazabal respecting laborer or out-or-town job assignments. Defendant Irwin has presented admissible evidence that Echazabal was informed of the availability of such positions, but that Echazabal failed to indicate to Irwin whether such positions were acceptable to him. (Kiesser Decl. ¶3.) Plaintiff Echazabal has presented admissible evidence he communicated his availability, but that no such offers were made. (Echazabal Supp. Decl. ¶14-16; Echazabal Depo. 199-201.) It is undisputed that Echazabal can work as a pipefitter, and do a variety of other forms of work. (Irwin's Fact 21.) It is disputed whether Kiesser requested that Echazabal discuss his work restrictions with his physicians, and have them provide input regarding what job functions he could perform. (Kiesser Depo. 63:24-25, 64:1-9; Kiesser Decl. ¶ 12; Echazabal Supp.

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[4] In Opposition to Irwin's MSJ (although not to Chevron's MSJ), plaintiff has presented several doctors' letters which, according to plaintiff, "verify that despite Plaintiff's disability he was still able to work in the Refinery, [and] were a part of Chevron's medical file and reviewed by Dr. McGill." (Pl.'s Opp. to Irwin's MSJ, 11:26-28, footnote 8.) Plaintiff also states that "Dr. Tang reviewed and apparently disagreed with" these letters. (Pl.'s Opp. to Irwin's MSJ, 11:4-5.) A letter from Dr. Suchov, dated July 20, 1994, states that plaintiff's "ability to work. . .is not impaired in any way," and appears to have been written to address the issue of whether Echazabal posed any risk to any *other* employee. The letter does not discuss the job for which plaintiff applied in 1995, nor does it discuss exposure to any substances. (Pl. Supp. Decl. Exh. E, p. 22.) A January 10, 1996 letter from Dr. Weingarten is discussed at footnote 4, supra. The medical clearance letter form Dr. Ha did not pertain to the job offered to plaintiff in 1995, and plaintiff has presented no admissible evidence that that letter was seen by Dr. McGill or Dr. Tang.

Dell. ¶ 14-16.) It is disputed whether Irwin was provided with such input. (Kiesser Depo. 66:8-22; Kiesser Dell. § 13; Echazabal Depo. 215-24-216:6; Plaintiff Supp. Dec. ¶18-19; Minsky Supp. Decl. Exh. X, Z.) While it is undisputed that Kiesser told Echazabal to keep in contact for other job assignments, it is disputed whether Echazabal did so. (Kiesser Decl. ¶3, Exh.16; Echazabal Depo. 214:20-24; Echazabal Decl. ¶14-16.) Plaintiff has presented admissible evidence that many jobs were filled by Irwin after February, 1996, which fell within plaintiff's job capabilities, but that no such jobs were offered to Echazabal. (Minsky Supp. Decl. Exh. S; Echazabal Supp. Decl. ¶15-16.)

III. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted if the evidence supporting the motion for summary judgment shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. The non-movant "may not rest upon the mere allegations or denials of the adverse party's pleading." A factual dispute is "genuine" if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 242, 248

(1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Id.* at 255. If the nonmoving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. *Id.* at 249-50.

IV. ANALYSIS

By its instant Motion for Summary Judgment, defendant Chevron seeks summary judgment in its favor as to all six of plaintiff's causes of action in the 1AC. In plaintiff's Opposition to Chevron's MSJ, plaintiff states that he has agreed to dismiss the Fourth and Fifth Causes of Action. Defendant Irwin seeks summary judgment as to the two causes of action in which it is a defendant, the First and Second Causes of Action. Therefore, the following analysis will address only the First, Second, Third, and Sixth Causes of Action, and the issue of punitive damages.

A. Chevron's Refusal to Hire Echazabal (First, Second, and Third Causes of Action)

1. Applicable Legal Standards

Plaintiff's First Cause of Action alleges that Chevron's withdrawal of Echazabal's job offer violated California's Fair Housing and Employment Act ("FEHA"), Cal. Gov. Code §12940. Plaintiff's Second and Third Causes of Action allege that Chevron's withdrawal of Echazabal's job offer violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, respectively.

The substantive standards for determining liability under the ADA and the Rehabilitation Act are the same. *McDonald v. Pa. Dept. of Public Welfare*, 62 F.3d 92 (3d Cir. 1995).[5]

The Americans with Disabilities Act ("ADA"), 42 U.S.C. §12112, provides, in relevant part, that "(a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to. . .hiring." Similarly, the Rehabilitation Act, 29 U.S.C. §794, provides, in relevant part, that "No otherwise qualified individual with a disability in the United States. . .shall, solely by reason of his or her disability, be excluded from the participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995), the Fourth Circuit set out the elements of an ADA claim, which are also applicable to the Rehabilitation Act:

> In order to establish a violation of either of these statutes, a plaintiff must prove: (1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of the disability. Regarding the second requirement, an individual is not otherwise qualified if he poses a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation.

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[5] The two statutes' most important difference, not relevant to this case, is that the Rehabilitation Act pertains to federal employers and employers who receive federal funds, while the ADA extends to private employers. *Shiring v. Runyon*, 90 F.3d 827, 830 (3d Cir. 1996); *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995).

Doe at 1264-65.

The same analysis used in ADA claims is employed in FEHA claims. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996); *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 66 (1996). The FEHA, like the ADA, provides that

> (1) Nothing in this part shall prohibit an employer from refusing to hire. . .an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ. . .an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties. . .in a manner that would not endanger his or her health or safety. . .even with reasonable accommodations.

Cal. Gov. § 12940(a)(1); *see also* Cal. Gov. Code § 12940(d).

Under regulations implementing the ADA and case law interpreting it, an individual who poses a "significant risk" (also known as a "direct threat") to *himself* is also not "otherwise qualified" under the second prong of the above analysis. 29 C.F.R. § 1630.2(r); *see also Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995).

> The determination that an individual with a disability poses a 'direct threat' shall be based on individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the

potential harm will occur, and (4) the imminence of the potential harm.

Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 763 (5th Cir. 1996). This "direct threat" analysis is equally applicable to ADA and Rehabilitation Act claims. *Daugherty*, supra at 698; see also EEOC Technical Assistance Manual § IV.5. California's regulatory scheme under FEHA is relevantly similar. Cal. Code Reg. § 7293.8(c), (d), and (f).

Thus under the ADA, the Rehabilitation Act, and FEHA, an employer may lawfully refuse to hire a disabled individual who is not otherwise qualified because the proposed employment poses a direct threat to the health of the employee himself.

2. Discussion

Chevron seeks summary judgment in its favor on Echazabal's First, Second and Third Causes of Action on the basis that Chevron's refusal to hire Echazabal was lawful, because Echazabal's liver condition made the position of plant helper a direct threat to Echazabal's health. Chevron's "direct threat" determination is therefore the sole issue in Chevron's Motion for Summary Judgment as to the First, Second, and Third Causes of Action.[6]

The elements of a direct threat analysis are set out in *Rizzo*, supra. Such an analysis requires an "individualized assessment of the individual's present ability to safely perform the essential

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[6] For purposes of this Motion, Chevron does not challenge that Echazabal has a disability under the FEHA, ADA, or Rehabilitation Act. (Memo. of P. & A. 4:27, footnote 1.) Irwin does bring such a challenge in its MSJ, discussed below. Nor does plaintiff argue that "reasonable accommodation" could or should have been made by Chevron in Opposition to Chevron's Motion for Summary Judgment, although this issue is raised with respect to Irwin.

functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Rizzo*, supra at 763. The danger to the individual must be immediate, under *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1534 (9th Cir. 1995) (FEHA). The employer must gather "all relevant information regarding the applicant's. . .medical history and independently assess both the probability and severity of potential harm." *Mendez v. Gearan*, 956 F.Supp. 1520, 1527 (N.D. Cal. 1997) (Rehab. Act).

It is undisputed that Chevron came to the conclusion that such a direct threat existed on the basis of Dr. McGill's individual assessment of Echazabal's liver condition, supported by his consultation with Dr. Bridge, conversation (memorialized by correspondence) with Echazabal's physician Dr. Weingarten, and the earlier evaluation of Echazabal by Dr. Bailey. All the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision in February, 1996, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed in the position of plant helper,[7] as posing a serious, immediate risk to him.[8]

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[7] The Suchov letter, presented by plaintiff in Opposition to Irwin's MSJ, although it places no work restrictions on plaintiff, does not evaluate plaintiff's medical condition specifically with respect to exposure to hepatotoxic substances, and does not indicate whether Dr. Suchov was aware that such exposure was contemplated. (Pl. Supp. Decl. Exh. E p. 21.)

[8] While plaintiff has presented admissible evidence from the Deposition of Chevron's Personnel Manager William Saner that he (Saner) was informed of future risks to Echazabal, other testimony in the same deposition makes clear that the risks communicated by Dr. McGill to Saner were *present* risks. (Saner Depo. 49: 21-50:2, 51:13-25.)

Plaintiff has presented evidence raising a genuine issue as to whether the position of plant helper would, in fact, have posed such a direct threat to Echazabal's liver condition or overall health. Indeed, plaintiff has presented evidence raising a genuine issue that despite elevated liver enzyme levels, plaintiff's liver function was normal, and that the substances to which he would be exposed in the position of plant helper posed no greater a danger to Echazabal than to other workers. (Fedoruk Decl. ¶4-29, Gitnick Decl. ¶5-29.) This evidence is contained in the Declarations of Drs. Fedoruk and Gitnick, and is based on their analyses. Although it is not clearly stated in plaintiff's filings or in the Declarations of Drs. Fedoruk or Gitnick, it appears that these analyses were undertaken sometime after February, 1996. The Declarations are both dated November, 1997. Dr. Fedoruk's analysis included a review of depositions and declarations pertaining to this case, all of which are dated 1997. (Fedoruk Decl. ¶4.) Dr. Gitnick's analysis involved the same documents, as well as Dr. Fedoruk's Declaration, which is dated November 4, 1997. (Gitnick Decl. ¶4.) Dr. Gitnick also evaluated blood tests dated as late as 1997. (Gitnick Decl. ¶7.)

While Drs. Fedoruk and Gitnick have both testified that the conclusions of Drs. Baily, McGill, and Tang are incorrect (Fedoruk Decl. ¶7, 26; Gitnick Decl. ¶8-12, 14), their evaluations were not performed until after the acts by Chevron and Irwin complained of by plaintiff.

In presenting a "direct threat" defense to a charge of discrimination under FEHA, the ADA, or the Rehabilitation Act, "[t]he assessment itself need not reach a medically unassailable conclusion; the law does not demand either omniscience or deuteroscopy." *Bento v. I.T.O. Corp. of Rhode Island*, 599 F.Supp. 731 (D.R.I. 1984). A "reasonable medical judgment that relies on . . . the best *available* objective evidence" is sufficient under *Rizzo*, supra (emphasis added).

The evaluations of Drs. Fedoruk and Gitnick, even if correct, were not available to Chevron or Irwin, and the evidence which was available to defendants supported their decisions.

The caselaw holds that an employer who refuses to employ an individual on the basis of medical information which turns out not to be completely accurate may nevertheless avoid liability. "A[n] employer is not required to be unfailingly correct in assessing a person's qualifications for a job. . .[Rather,] [t]he employer's belief must be objectively reasonable." *Cook v. State of R.I. Dept. of MHRH*, 10 F.3d 17 (1st Cir. 1993). In *Bento*, supra, the employer participated in the plaintiff's referral to two different doctors at two different times, neither of whom had provided an unqualified endorsement of the plaintiff's physical ability to do the work without danger to himself. Bento was a longshoreman, whose medical clearance specified that his pulse rate not rise above 120 beats per minute. The Court held, "Whether or not wrong as a matter of medical fact, the defendant's decision was a reasonable one, based on what, in the exercise of due diligence, it had learned." *Bento* at 745. In *Walker v. Attorney General*, 572 F.Supp. 100 (D.D.C. 1983), an FBI employee with angina was discharged after the FBI concluded that this medical condition would prevent him from performing his job. In *Walker*, contemporaneous medical information, available but not communicated to the FBI at the time the decision was made, indicated that Walker's condition was not as severe as Walker's own physician had represented. Nevertheless, the Court held,

> The only issue of law before the Court is whether the FBI owed plaintiff a duty to inquire further into his medical condition and to uncover the fact that the diagnosis of both plaintiff's cardiologist and the National Naval Medical Center was in error. . .[T]he FBI was reasonable in concluding the plaintiff was not qualified for his position. Whatever duty the agency may have had to inquire into the

> accuracy of plaintiff's doctor's diagnosis (and the Court makes no finding that such a duty necessarily exists), it was more than adequately complied with by referring the plaintiff to the National Naval Medical Center for an examination that confirmed that diagnosis. Defendant's decision to fire plaintiff was therefore justified, and cannot be challenged under the Rehabilitation Act. Of course, had the true nature of plaintiff's emotional problems been known by the FBI, it is possible that plaintiff could establish that he is an 'otherwise qualified' handicapped individual. But where the only facts before the employer establish without contradiction that the plaintiff is not 'otherwise qualified,' the employer cannot be accused of discrimination against an 'otherwise qualified' employee when it chooses to fire him.

Walker, supra at 102-3. On this basis, the Court granted summary judgment in favor of defendant.

Plaintiff seeks to distinguish this case from *Doe*, supra, and *Scoles v. Mercy Health Corp.*, 887 F.Supp. 765 (E.D. Pa. 1994), in which the court upheld termination of HIV-positive medical personnel on "direct threat" grounds despite later-discovered medical evidence contradicting such a threat. In those cases, the employers were not liable, because they had relied on "the most current medical knowledge." Plaintiff argues that this case is distinguishable from *Doe* and *Scoles*, supra, because the medical evidence contradicting that which was before Chevron did not represent a medical advance, but rather reflected current medical knowledge at the time Chevron made its decision. However, Chevron's non-liability, like that of the employers in *Walker* and *Bento*, supra, is not based upon its reliance upon the "most current medical knowledge," but rather upon its reliance on "the best available objective evidence."

Chevron's position is therefore straightforwardly analogous to that of the employers in *Bento* and *Walker*, supra. Like the

employer in *Bento*, Chevron received a qualified approval of the plaintiff's suitability for the position in question. The medical evidence presented to Chevron placed a restriction on Echazabal (no hepatotoxic substance exposure) just as the medical evidence before ITO suggested Bento not engage in activity which would elevate his heart rate. Like the medical information used by the FBI in *Walker*, the evidence before Chevron may in fact have been medically incorrect. In *Walker*, contemporaneous evidence suggested Walker's angina was not as severe as Walker's physician reported to the FBI. Nevertheless, despite the availability of this contemporaneous contradictory medical evidence, the FBI was held to have acted reasonably on the basis of the medical evidence which was before it.

In this case, Chevron relied upon Dr. McGill, whose opinion confirmed that of his predecessor, Dr. Baily. Chevron, through Dr. McGill, also made inquiries of Echazabal's physician, Dr. Weingarten, and sought the opinion of Chevron's Medical Director Dr. Bridge. This degree of diligence is equivalent to that of the FBI in *Walker*, in which, after the plaintiff's doctor's opinion was confirmed by the National Naval Medical Center, the FBI looked no further. The medical evidence controverting that upon which Chevron relied, which plaintiff has presented only after the fact, therefore does not raise a genuine issue of material fact as to whether Chevron behaved reasonably in relying upon the medical evidence before it.[9] Plaintiff's

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[9] In Opposition to Irwin's MSJ (although not to Chevron's MSJ), plaintiff has sought to distinguish this case from *Bento* and *Walker*, on the basis that the controverting medical evidence in those cases went to the issue of whether the plaintiff had a disability, not to whether an acknowledged disability posed a direct threat. (Pl.'s Opp. to Irwin's MSJ, 22:18-28, footnote 14.) However, when, as in *Bento*, *Walker* and this case, the direct threat in question is to the plaintiff himself, any evidence that the plaintiff is not actually disabled would,

contention that Chevron was under a further duty to gather additional information about specific concentration levels, alternative interpretations of enzyme functions tests, and so on, is unsupported by caselaw or other authority. (Pl.'s Opp. 21-22:2.)

To summarize, the issue is not whether Chevron was in fact objectively *correct* in its determination that Echazabal's continued employment at the refinery posed a direct threat to his health. Thus plaintiff's presentation of evidence that such employment did *not* present such a direct threat is not sufficient to raise a genuine issue of material fact in opposition to Chevron's Motion for Summary Judgment on these causes of action. As plaintiff has presented no admissible evidence raising a genuine issue of material fact as to whether Chevron was reasonable in its determination that the employment of Echazabal presented a direct threat to the plaintiff, summary judgment is GRANTED in favor of defendant Chevron on the FIRST, SECOND, and THIRD Causes of Action.

B. Chevron's Role in Irwin's Termination of Echazabal

Plaintiff's Sixth Cause of Action alleges that Chevron intentionally interfered with Echazabal's contractual relations with Irwin.

The elements of a cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a

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a fortiori, be evidence that employment in a particular position poses no direct threat to the plaintiff. If the caselaw does not require unassailable medical judgments as to actual disability, it cannot require them as to direct threat. Plaintiff has presented no caselaw or other authority in support of different requirements as to these two prongs of the analysis, and this Court is aware of none.

breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Savage v. Pacific Gas and Electric Co.*, 37 Cal. App. 4th 434, 448 (1993).

Defendant Chevron moves for summary judgment in its favor on the basis that Echazabal has presented no admissible evidence of the third element, Chevron's intent to induce a breach of the contract between Irwin and Echazabal. Such intent is an essential element of a claim for intentional interference under *Savage*, supra, and *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 766 (1984), overruled on other grounds.

Plaintiff has presented no admissible evidence in support of his contention that Chevron by its February 21, 1996 letter intended that the relation between Irwin and Echazabal be terminated. Although plaintiff has presented admissible evidence that Chevron intended (and indeed, required) that Echazabal no longer work in any position at the refinery in which he would be exposed to certain substances, this does not amount to an intention that Irwin terminate Echazabal; rather, Irwin might have reassigned him. Defendant Chevron has presented uncontroverted admissible evidence that Chevron intended only that Irwin place Echazabal in a position in which he would not be exposed to hepatotoxic substances. (Saner Decl. ¶10; Exh. 14 in support of Irwin's MSJ.) This does not amount to an intent to induce a breach or disruption of the contractual relationship between Echazabal and Irwin under *Savage* and *Seaman's*, supra. Evidence suggesting Chevron's prior lack of concern with Echazabal's exposure to such substances does not support an interference that Chevron intended that Irwin terminate Echazabal's employment altogether. Therefore, summary judgment is GRANTED in favor of Chevron on Echazabal's SIXTH Cause of Action, intentional interference with contractual relations.

C. Chevron's Motion for Summary Judgment as to Claims for Punitive Damages

As summary judgment has been granted in favor of Chevron on all causes of action against it, the issue of punitive damages as to Chevron is MOOT.

D. Irwin's Motion for Summary Judgment on the First and Second Causes of Action

Defendant Irwin seeks summary judgment in its favor on the First and Second Causes of Action against it, and also moves for summary judgment on plaintiff's claims for punitive damages.

The "direct threat" analysis engaged in by Chevron, set out above at IV.A supra, is also applicable to Irwin. It is undisputed that Irwin's decision, made by Kiesser, to remove Echazabal from the refinery was based on the letter from Chevron and Kiesser's communications with Dr. Tang. (Kiesser Depo. 115:14-20 and passim.) As required by *Rizzo*, supra, Irwin engaged in an "individualized assessment" of Echazabal, "based on a reasonable medical judgment that relies on. . .the best available objective evidence." *Rizzo*, supra at 763. The evaluation provided by Tang indicated that the danger to Echazabal was immediate, as required by *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1534 (9th Cir. 1995) (FEHA). Irwin gathered "all relevant information regarding the applicant's. . . medical history and independently assess[ed] both the probability and severity of potential harm," as required by *Mendez v. Gearan*, 956 F.Supp. 1520, 1527 (N.D. Cal. 1997) (Rehab. Act). Irwin, like Chevron, can be analogized to the employers in *Bento* and *Irwin*, who, while they may have reached medically incorrect judgments, behaved in an objectively reasonable, and therefore lawful, manner. Irwin did not simply rely upon Chevron's letter; it sought further objective evidence from Dr. Tang, which confirmed the opinion

of Chevron's doctor. As in *Walker*, the employer was under no duty to inquire still further.

Irwin also argues that Echazabal's causes of action fail because Echazabal is not disabled. However, the ADA and FEHA protect not only actually disabled persons, but also those "regarded as" disabled by their employers. 42 U.S.C. § 12102(2) (ADA); Cal. Gov. Code § 12926(k) (FEHA); see also 29 C.F.R. § 1630.2(1) (EEOC ADA Regs.); 2 Cal. Code of Regs. § 7293.6(e)(2)(A)-(D) (FEHA Regs.). Where a plaintiff's condition is treated by his employer as posing a direct threat, such a plaintiff has almost by definition been "regarded as" disabled by that employer. *Roe v. District of Columbia*, 842 F.Supp. 563, 568 (D.D.C. 1993). Such is the situation in this case.

However, in Opposition to Irwin's Motion for Summary Judgment, plaintiff has also argued the issue of "reasonable accommodation" by Irwin. An employer violates the ADA in excluding an otherwise qualified disabled person from employment, even if he poses a direct threat to himself, if the threat can "be eliminated by reasonable accommodation," *Doe*, supra, at 1264-65. FEHA similarly requires that the direct threat not be able to be eliminated by "reasonable accommodations." Cal. Gov. Code § 12940(a)(1); *see also* Cal. Gov. Code § 12940(d). Under both the ADA and FEHA, an employer has an affirmative obligation to make reasonable accommodation to an individual's disability, so long as such accommodation does not constitute an undue burden. *School Board of Nassau County v. Arline*, 480 U.S. 273, 289, fn. 19 (1987); *Prilliman v. United Airlines*, 53 Cal. App. 4th 935 (1997). Reasonable accommodations include job restructuring and reassignment. 2 C.C.R. § 7293.9(o); 29 C.F.R. § 1630.29(o).

In this case, plaintiff has presented admissible evidence raising genuine issues of material fact as to whether Irwin could

have made reasonable accommodation to plaintiff's disability (whether real or perceived), for example, by placing him in positions for which he was qualified and which would not have involved exposure to hepatotoxic hydrocarbons. Plainitff has presented admissible evidence that plaintiff was qualified for such positions, that such positions existed and were filled by Irwin during the relevant times, that plaintiff made himself available for such positions, and that Irwin nevertheless did not assign him to such positions. Because genuine issues of material fact remain as to whether reasonable accommodations by Irwin might have rendered plaintiff "otherwise qualified" for employment by Irwin, summary judgment on the First and Second Causes of Action as to defendant Irwin should be DENIED.

E. Irwin's Motion for Summary Judgment as to Claims for Punitive Damages

The availability of punitive damages is a question of state law. *Central Office Tel. v. AT&T Co.*, 108 F.3d 981, 993 (9th Cir. 1997). In order to recover punitive damages under California law, a party must prove the defendant was guilty of malice or oppression (or fraud, not at issue in this case), defined by Cal. Civ. Code § 3294(a) in pertinent part as follows:

> (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

In Opposition to Irwin's motion for summary judgment as to claims for punitive damages, plaintiff argues in effect that malice may be inferred from any facts supporting violation of

the ADA (and, by implication, FEHA as well). (Pl.'s Opp. 33:18-34:16.) This position is not supported by law.

> 'Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage.' . . . [A] conscious disregard [rather than reckless disregard or misconduct] . . . may constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant. . .wilfully and deliberately failed to avoid (harmful consequences to the plaintiff).

Taylor v. Superior Court, 24 Cal. 3d 890, 894-5 (1979).

In this case, although plaintiff has presented admissible evidence raising genuine issues of material fact sufficient to oppose Irwin's motion for summary judgment on Echazabal's claims that his rights under the ADA and FEHA were violated, plaintiff has filed to present that "something more," admissible evidence raising a genuine issue of material fact as to Irwin's conscious disregard of Echazabal's rights. Irwin's motion for summary judgment as to punitive damages should therefore be GRANTED.

V. CONCLUSION

Defendant Chevron's Motion for Summary Judgment is GRANTED.

Defendant Irwin's Motion for Summary Judgment is DENIED as to the First and Second Causes of Action, but GRANTED as to the issue of punitive damages.

IT IS SO ORDERED.

Dated: January 5, 1997

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge

APPENDIX E

RELEVANT STATUTES AND REGULATIONS

1. Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*

§ 12111. Definitions

As used in this subchapter. * * *

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

§ 12112. Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employee compensation, job training, and other terms, conditions, and privileges of employment. * * *

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. * * *

2. ADA Regulations, 29 C.F.R. Part 1630

§ 1630.2 Definitions.

* * *

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. * * *

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that

cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm. * * *

§ 1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following: * * *

(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. * * *

3. Rehabilitation Act, 29 U.S.C. § 701, *et seq.*

§ 794 (a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *

4. Rehabilitation Act Regulations, 29 C.F.R. § 1614.203

§ 1614.203 Rehabilitation Act.

* * *

(6) *Qualified individual with handicaps* means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question; or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.